WISDOM

THE MAGAZINE OF KNOWLEDGE AND EDUCATION

SUPREME COURT JUSTICE FELIX FRANKFURTER

Portrait by Karsh of Ottawa

TWENTY-EIGHTH ISSUE

THE LAW, JUSTICE, AND MODERN MAN

AND OTHER TIMELESS ARTICLES MAGNIFICENTLY ILLUSTRATED

LIMITED EDITION

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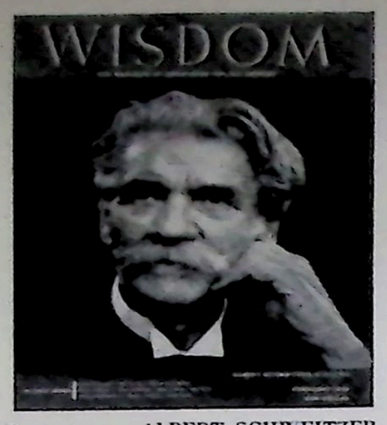

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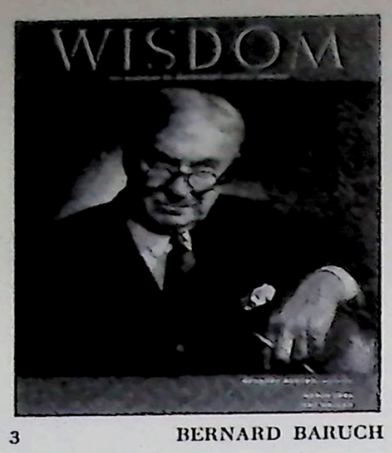

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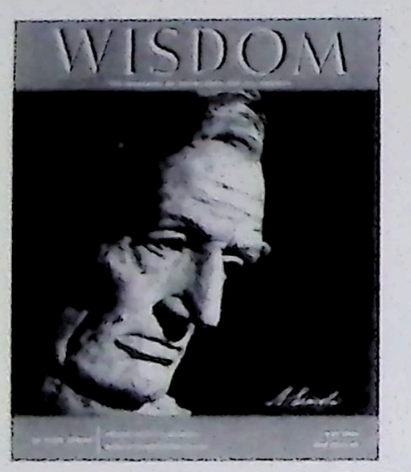

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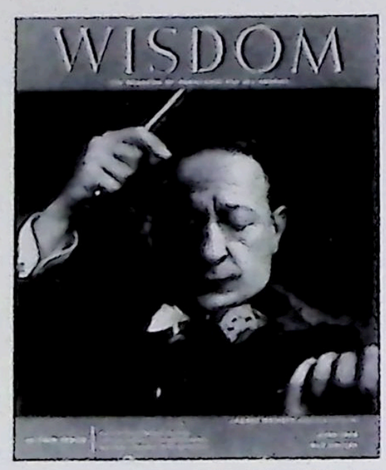

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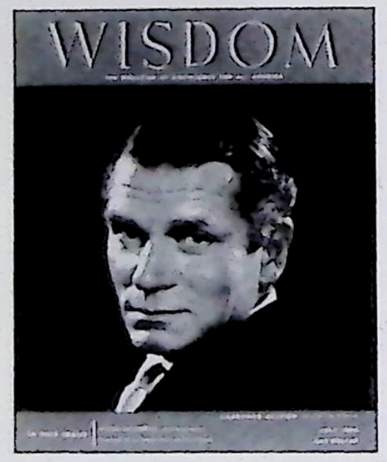

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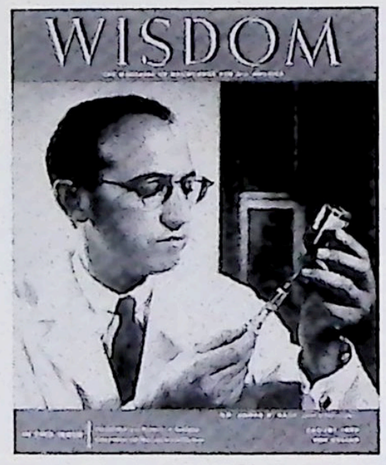

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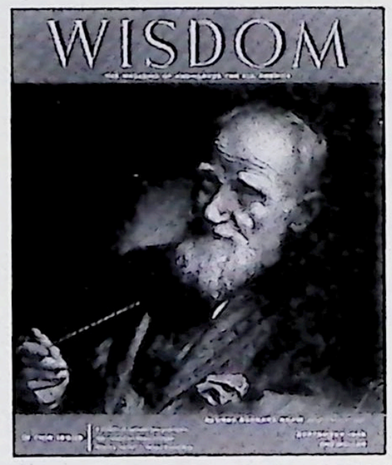

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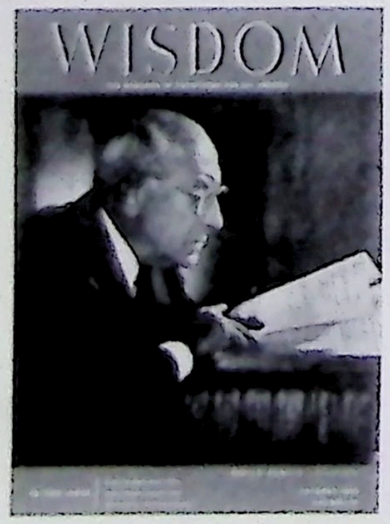

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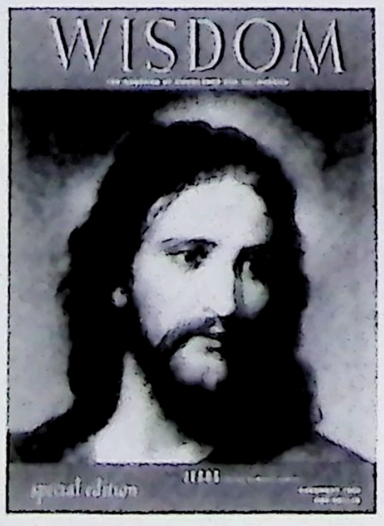

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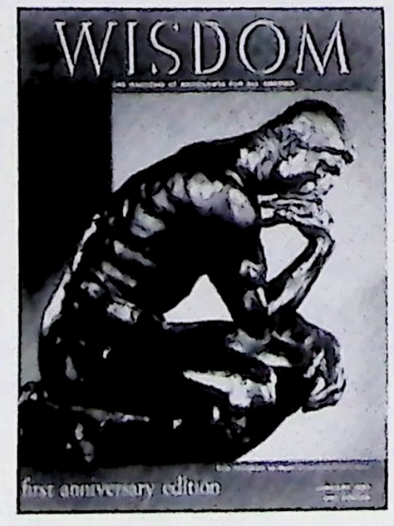

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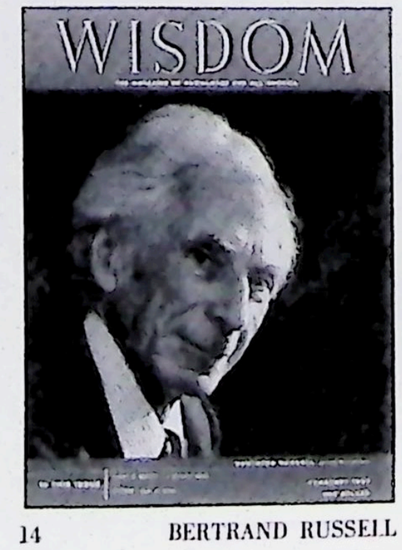

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LEON GUTTERMAN
EDITOR AND PUBLISHER

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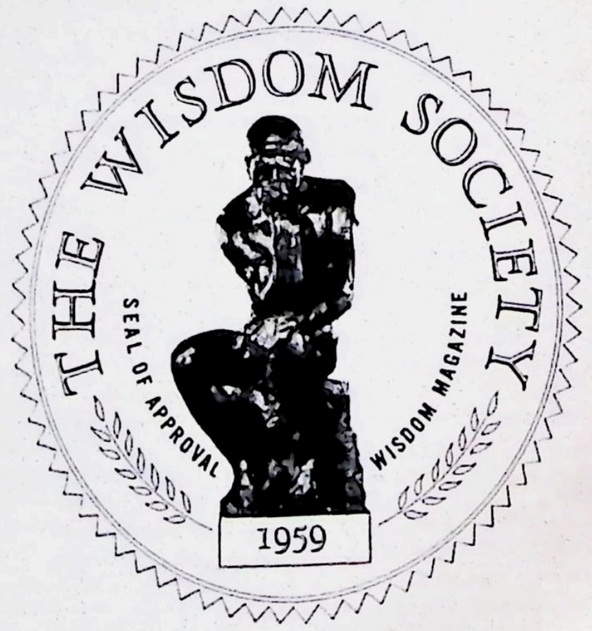


"All that is necessary for the forces of evil and ignorance to win in this world is for enough good and intelligent people to do nothing"

A LETTER FROM THE PUBLISHER

LEON GUTTERMAN, EDITOR AND PUBLISHER

ONE OF THE IMPERATIVE NEEDS for people today is a faith adequate for the times and circumstances in which we live. Old things are disappearing; restlessness is everywhere; skepticism and denial are common, and fear has become the common scarecrow. The world seems to sneer at its yesterdays and mistrust its tomorrows. The civilized world of today vacillates between deep disillusionments and great expectations of imminent possibilities.

We are living in a cynical age. Man is less optimistic about himself, or has less faith in humanity than the world has ever known. Less than ever do we as a whole believe in kindness and goodness. Some of the great men who lived centuries ago might really be ashamed of us as their intellectual descendants. We have no illusions about the misery of human nature and the wickedness of the world. But we have no illusions either about the blindness and the harm worked by those who are ignorant and exalt evil to fight against evil and who look upon wisdom as a myth which should not be taken seriously. The ignorant and uneducated people do more than their part in ruining this world and in driving it to folly and despair. Ignorance threatens to destroy the entire fabric of our civilization if we do not eradicate it with as much promptitude and ruthlessness as we have eradicated many diseases.

I am not a pessimist. I cannot agree with Sophocles that it were better never to have been born. The world is imperfect, but one takes it as it is and does the best one can. The brief procession of human life seems little more than the flicker of a dying candle against eternity. Yet, in spite of the prophets of doom who are always with us, wisdom finds a pathway and a light for our feet through darkness and storm. I believe that life can be worth living. I believe this in spite of pain, squalor, cruelty, unhappiness, and death. I also believe that man, as individual, as group, and collectively as mankind, can achieve a satisfying purpose in existence. I believe this in spite of frustration, aimlessness, frivolity, boredom, and failure.

Our minds are very small, and we have not yet learned to think far beyond our own self-interest. Our hearts are very small, and we have not yet learned to love beyond our own good. Where knowledge is supreme, one may be coldly intellectual; where love is dominating there may be a fervor that lacks judgment. When love is made rich in knowledge, the head and the heart support each other, and intelligence is warmed with love, while love is stabilized with knowledge. This means an enriched personality.

The heart of education is the education of the heart. Educate a crook and you'll have a menace to society. Educate a saint and all of society benefits. The true education of the heart will drive a man to get as much education of the mind as he can use in the service of others. For this education of the heart, however, no advance degrees are offered because the further one goes, the further he sees to go. One of the gravest lessons we receive from the experience of life is that all those things which are in themselves good—all these things without love and good will, only serve, in fact, to make men more wicked and more unhappy. This is because without love and wisdom man turns into evil the best that is in him.

Wisdom is always disturbing, as the sudden impact of light is painful to the eye. Yet after the mental or physical eye is adjusted to the new light, the situation is not so bad after all. It is the children of little faith who are easily scared. Wisdom is normal. It is not something apart from life. It is life. It is larger than any human interpretation of it. It cannot be encompassed within the contents of any definition. It cannot be identified with any thing or place seeking to express it. It belongs to no age, but to all the ages. It stoops to help the lowest, yet forever transcends the highest. It meets man at the point of his need, and makes him adequate against any foe that humanity is heir to. It is a thrilling, never-ending quest for reality, truth and moral grandeur in all personal and human relationships.

Wisdom gives us eagerness to explore the richness of the world as a diver explores the depths of the sea. It makes us aware of all those around us who might be the enlighteners of our spirits. It shows us as much of beauty and understanding as we can hold. Wisdom gives us eyes to see and ears to hear; it gives us open minds and gentle hearts. It keeps us indifferent to time and place but keenly aware of the simple human values by means of which men, women and children live happily together. Wisdom gives us respect for our minds. It teaches us how not to put them to low uses, nor waste them in purposeless pursuits. It helps us to see that the dignity of life comes from the sweep of the mind, from the integrity of thought. It reminds us that although our bodies may fail, life still holds adventure and meaning if our minds are trained to think.

This is a world of simple beliefs, requiring no theology and no hypothetical rewards and punishments. It is enough that man's heart is still touched by beauty and goodness and justice and kindness. Knowing that God who is the Author of all things is ever so high above us, how can we live except by the highest and best in us? We should be ashamed to live otherwise. To live the good life, to act according to our highest and noblest instincts is merely the right thing to do. That is wisdom. It is, in fact, to be religious, to have reverence, for this life. As Mencius, the advocate of the higher life, put it, "He who attends to his greater self becomes a great man and he who attends to his smaller self becomes a small man."

Leon Gutterman

MR. JUSTICE FRANKFURTER

Supreme Scholar of the Supreme Court

by Anthony Lewis

Few scholars, and few scholars of the law, have written a more natural, more lucid or more readable English than Mr. Frankfurter writes at his best.

ARCHIBALD MACLEISH
Poet, and Professor of Rhetoric, Harvard University.

IT IS HARD TO BELIEVE that the Supreme Court justice who whistles "The Stars and Stripes Forever" in the marble corridors, the justice of the bright eye, the exuberantly curious mind, the energetic step—in short, that most youthful of men is about to turn 76.

He has been a member of the Court for almost twenty years, and for three decades before he had been in or on the edge of public life. But despite this service he remains to the public, by all indications, a perplexing figure.

The puzzlement is not especially puzzling. For the justice is a man of contradictions. It would not be too inaccurate to characterize him as a passionate ascetic, a libertarian traditionalist, a worldly intellectual.

No better statement of the judicial philosophy of Justice Frankfurter can be found than that in one of his own opinions. A majority of the Supreme Court in 1943 held it unconstitutional for a state to require children whose religion forbade it to salute the flag. Justice Frankfurter, dissenting, began:

"One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime.

"But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic . . . As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."

That, then, is the dominant theme—the need for judges to put aside their private views, to defer to legislative judgments, to exercise the self-restraint inherent in Justice Frankfurter's conception of the judge's function. It is a theme derived from, among other sources, the greatest of his heroes, Mr. Justice Holmes.

Of course, the Frankfurter view represents just one side of a continuing debate on the role of the Supreme Court. There are those, on the Court and off, who believe it should play a much more aggressive part in advancing civil liberties, and who regard Justice Frankfurter's philosophy as dangerously uncreative.

The reasons for judicial self-restraint in the Frankfurter canon are several. There is, first, the thesis that reliance on the courts to preserve our liberties drains responsibility from those who should exercise it—the legislature and the people themselves. The tendency is to say: Perhaps this legislation is unwise, but if it is too bad, the Supreme Court will knock it down.

A second reason is the belief that it is undemocratic and dangerous for nine men, appointed for life, to exercise their power to veto legislation, except in the narrowest, most evident and urgent cases. This belief was hardened in the crucible of the Nineteen Twenties and Thirties, when the private views of a slim majority on the Supreme Court overturned urgent economic measures of state and nation.

Finally, Justice Frankfurter believes that for the Court to attempt too much, to press its policy views, is to invite its own destruction. That was for him the lesson in the Nineteen Thirties, when a self-willed Court lost public confidence and brought "itself to the brink of drastic reform."

Concern for the Supreme Court as an institution is perhaps first among Justice Frankfurter's motivations. It is this concern that has made him protest more than once against hasty decisions, and that made him, for example, read his colleagues a twenty-five-page lecture against taking on too many trivial cases for review.

Among the present justices he is the outstanding student of the Court's history. His institutional sense takes form also in a special respect for the Court's traditions.

The most significant aspect of his feeling for the institution of the Court is one inherited especially from another of his heroes, Mr. Justice Brandeis. That is Justice Frankfurter's insistence on

Justice Frankfurter by Karsh

In this picture by Ackad, seated left to right: William O. Douglas, Hugo L. Black, Chief Justice Warren, Felix Frankfurter, Harold H. Burton (resigned because of illness and replaced by Judge Potter Stewart). Standing left to right: William J. Brennan, Jr., Tom C. Clark, John M. Harlan, Charles E. Whittaker.

Justice Frankfurter meets with college students following a lecture at Brandeis University.

confining the grounds of decision in any case to the minimum needed to settle it, avoiding constitutional decision whenever possible, and rigorously enforcing technical jurisdictional requirements. He is especially fitted for this job because he was, as a law school professor, an authority on jurisdictional rules.

These interwoven philosophical strands—self-restraint, the institutional sense, respect for tradition and technical rules—have brought on Justice Frankfurter the label "conservative." This comes as an unfriendly judgment from some who expected the new justice, when he was appointed in 1939, to be a judicial New Dealer. It comes as praise from, for example, a Boston bar which feared him in 1939 as a radical.

Both reactions are based on what Justice Frankfurter would consider the same misconception—the idea that a judicial decision has anything whatever to do with "liberalism" or "conservatism" in a political sense. Professor Louis L. Jaffe of Harvard Law School concluded in an authoritative study of Justice Frankfurter's opinions: "It is of the very essence of his judicial philosophy that his role as a judge precludes him from having a program couched in these terms of choice."

It would be a mistake, and a grave one, to believe that Justice Frankfurter's approach to his job limits his importance on the Supreme Court. A good case can be made—and is made, by his enemies as often as his friends—for the proposition that he has been a most influential member of the Court.

For one thing, he plays a paramount part in defining the issues. Because almost any case can be decided on many different grounds, the most important question may be what to decide. Again and again during oral argument before the Court, Justice Frankfurter will raise the issue on which the decision is eventually rested. One of his loudest critics, Walton Hamilton, complained in 1947:

"The Court has no business allowing him to select, from all the issues the case holds, the question upon which it must turn."

Moreover, Justice Frankfurter has been a balance wheel, often casting the deciding vote in the Court's recurrent divisions. And he has helped to shape the course of decisions in ways that do not necessarily appear in the printed opinions.

Signs of his influence appear, for example, in the school segregation cases. Two especially notable factors contributed to the moral force of the 1954 decision. The first was the length of deliberation by the Court, the repeated orders for reargument of the cases. This calculated delay bore the Frankfurter trademark.

The second factor was the unanimity of the Court when it finally spoke through Chief Justice Warren. That unanimity may have been made possible by the formula devised to permit gradual desegregation—compliance "with all deliberate speed." There is a belief, that is, that one or more of the justices were reluctant even to decide the constitutional claim if a decision necessarily entailed immediate, drastic judicial enforcement. The gradual compliance formula is a concept that could have come from Justice Frankfurter, and the phrase "with all deliberate speed" is in fact a favorite of his that he had used in at least three opinions before the school cases.

Boston's misconception of Felix Frankfurter as a radical, and its subsequent mistrust of his appointment to the Court, derived in good part from his role in bringing the Sacco-Vanzetti case to world attention. He was a Professor of Law at Harvard then, and as a private citizen he wrote devastating attacks upon the murder convictions of the two anarchists. But the point was not their politics. It was that they had been deprived, in part because of their politics, of a fair trial.

A deep belief in the importance of fair procedure has been as evident in Frankfurter the judge as in Frankfurter the citizen commentator. His creed was expressed in a 1943 opinion: "The history

of liberty has largely been the history of observance of procedural safeguards."

In this area the justice's philosophy does not emphasize deference to the political branches. As he sees it, the courts have special competence to pass on the requirements of fair procedure, and a special obligation not to be instruments of injustice. His particular interest has been the Fourth Amendment's prohibition against "unreasonable searches and seizures." Dissenting in 1947 from the Court's approval of a search without warrant, he wrote:

"What is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole."

Closely related to his views on criminal procedure are his strong feelings on what he has called "the integrity of the prosecutorial system." One of the great experiences of his life was his service as assistant to Henry L. Stimson, then United States Attorney in New York, beginning in 1906. Mr. Stimson has been Justice Frankfurter's model of rectitude, integrity, selflessness. Very little distresses him so much as to see a Government officer fall below the Stimson standard.

To Justice Frankfurter, improper means can never be justified by the end of fighting crime. Thus, when Federal agents planted a recording device on an undercover man while he talked with a criminal, and so obtained the latter's conviction, the Justice dissented. He wrote:

"Of course, criminal prosecution is more than a game. But in any event it should not be deemed a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned on and off as though it were a hot-water faucet."

"Dirty business" had been Justice Holmes' phrase for wiretapping. Like him, Justice Frankfurter had wanted to hold wiretapping unconstitutional—and never quite had the votes on the Court to do so.

Underlying his views on wiretapping and illegal search—"the knock at the door," he has called it—is Justice Frankfurter's deep belief in the importance of privacy. For the same reason he has had relatively little sympathy for sound-truck operators and peddlers who invade the home to hawk their wares.

In 1948 he wrote:

"The men whose labors brought forth the Constitution of the United States had the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic. Our democracy presupposes the deliberative process as a condition of thought and of responsible choice by the electorate. To the Founding Fathers it would hardly seem a proof of progress . . . that the blare of sound trucks must be treated as a necessary medium in the deliberative process."

The phrase "the deliberative process" is one that comes naturally from Felix Frankfurter. He is that rare bird, the unashamed intellectual. In a softening civilization, he has retained the ability and the will to think problems through in a tough-minded way.

Perhaps one of his most important contributions to the Supreme Court has been his insistence on exposing the real difficulties in cases, refusing to ignore or evade them. No one has ever accused him of being mentally lazy. His effort—whatever his views on the merits of the case—is always to work out rational, not sentimental, solutions.

Nor is his intellectual life bounded by the Supreme Court. The world of ideas lives also in his home, thanks to a remarkable wife, the former Marion Denman. Friends—and the justice himself—ascribe much of the justice's success in life to Mrs. Frankfurter. She is described as a woman of unusual wisdom and conviction, his intellectual equal and not prepared to be bowled over by his brilliance, who has tested his ideas by making him define and explain and prove.

Justice Frankfurter is no ivory-tower intellectual. He is a cultivated man, an eighteenth-century man in the range of his interests. He reads everything—the most obscure newspaper stories, philosophy, science, complete reports of the high courts of Britain, Canada Australia. He corresponds with people all over the world. Among his friends have been John Dewey, Thomas Mann, Al Smith, Alexander Woollcott, Albert Einstein, Alfred North Whitehead, Chaim Weizmann, Franklin Roosevelt.

One of his most important personal characteristics is his love of people as people—his interest, his joy in them. Without children himself, he loves children and they love him. The extraordinary affection which joins him to his former law clerks brings them from all over the country annually for a dinner, usually held near the anniversary of his appointment to the Court, which may be the high point of the Justice's year.

He is a man who feels strongly about people and about ideas, a man of fierce loyalties and convictions. While he was a Harvard Law School professor he spent much of his time battling for causes. To meet him now is to sense an electric presence, to know the vigor of the views he can no longer publicly express.

The truth is that Felix Frankfurter, exponent of judicial restraint, is really a man of emotion. No one could fail to see this in the intensity with which he will argue any subject except Supreme Court business in private conversation, his small frame darting here and there, his hand now and then gripping his listener's elbow as he makes a point. This quality is evident in his teacher's love of provocation and contention, the unrestricted give-and-take with his law clerks, the heckling from the bench that distresses lawyers who are unprepared for it.

"A passionate person," one friend calls him, "who has given up the other passions of his life for this one—the institution of the Court."

That this passionate man finds it no easy job to be a judge, to put aside personal feelings, to suffer the disapproval of libertarian friends—all this is evident from the language of Justice Frankfurter's dissent in the Flag Salute Case. The conflict of man and judge is a reason, too, for his need to explain himself in so many separate concurring and dissenting opinions.

He would not expect it to be said that he wholly succeeds in reaching his goal of judicial disinterestedness. But his effort does not slacken. Recently, during an oral argument, he got the impression that a lawyer was appealing to his personal view of a harsh deportation statute.

"Never mind what I think of it," he said sharply from the bench. "I think very ill of it."

Learned Hand, the revered retired chief judge of the United States Court of Appeals for the Second Circuit, was asked recently for comment on Justice Frankfurter's approaching birthday. His answer emphasized the justice's striving for disinterestedness.

"In consequence (of Justice Frankfurter's view of the judicial role)," Judge Hand wrote, "I regard him at the moment as the most important single figure in our whole judicial system.

"He has reached an age that in earlier times might have seemed too great for the severe public duties of his office. In his case a super-abundant vitality that is apparent to all gives promise of a further long period during which he will sit in the Court, to whose work and standing he has contributed so much.

"It would be impossible for me to think of any other judge whose continuance in his duties I welcome more unreservedly." ♦

BACKGROUND OF THE SUPREME COURT

We are under a Constitution, but the Constitution is what the judges say it is.
CHARLES EVANS HUGHES

by James Barbar

THE ONLY COURT established by the United States Constitution is the Supreme Court; other federal courts are created by act of Congress. The Constitution of 1789 provided that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."

Congress has power to prescribe the number of members of the Supreme Court and other federal courts. The number of federal judges of any of the courts is not designated in the Constitution. The first act of Congress, in 1789, set up a court of six. In February, 1801, before the Federalist party went out of office, Congress passed an act reducing the number of judges to five, to become effective at the occurrence of the next vacancy. This was repealed by Congress in March, 1802, and the number remained the same, at six. In 1807, Congress increased the number to seven, and the court was thus constituted for a period of thirty years. In 1837, however, the number of judges was increased to nine. Nearly thirty years more passed, when, in 1863, the number was increased to ten. By an act of 1866, however, the positions of two judges were not filled, thus leaving the court at eight. In 1869, the final change took place. The number of judges was fixed at nine, and it has remained so ever since. In recapitulation, the changes were as follows:

1789	6	1837	9
1801	5	1863	10
1802	6	1866	8
1807	7	1869	9

The Constitution provides that "the judges both of the Supreme and inferior courts, shall hold their offices during good behavior," and prevents the discharge of a judge during tenure without adequate cause. The number of judges may not at any given time be reduced, and reduction can only take effect at a future time.

The term of the judges is for the duration of good behavior, which is for life, unless a Justice resigns, or by impeachment is expelled from office. Impeachment proceedings have been brought against only one Justice of the Supreme Court—Samuel Chase—and he was acquitted, in 1805.

A Justice who has served for a period of ten years or more may resign or retire with pay upon reaching the age of seventy. ♦

THE BOLD EXPERIMENT OF FREEDOM

by Felix Frankfurter

BY ITS FOUNDERS this nation was committed to democracy, in which we all profess our faith. Even its enemies pay democracy the tribute of appropriating its name. For democracy is the only form of social arrangement that fully respects the richness of human society and, by respecting it, helps to unfold it. Democracy is thus the only adequate response to the deepest human needs and justified as such by the long course of history. All the devices of political machinery—parties and platforms and votes—are merely instruments for enabling men to live together under conditions that bring forth the maximum gifts of each for the fullest enjoyment of all. Democracy furnishes the political framework within which reason can thrive most generously and imaginatively on the widest scale—least hampered, that is, by the accident of personal antecedents and most regardful of the intrinsic qualities in men.

Not only the experience to which history testifies but nature herself vindicates democracy. For nature plants gifts and graces where least expected, and under circumstances that defy all the little artifices of man. To meet nature's disregard of distinctions that are not intrinsic, but merely man-made, we need political and economic institutions that allow these mysterious bounties their fullest outlet.

Thus we Americans are enlisted in a common enterprise—whatever our antecedents, whatever the creed we may avow or reject—the bold experiment of freedom. It is bold because it cannot be realized without the most difficult and persistent collaborative effort. It demands the continuous exercise of reason, and self-discipline of the highest order.

We are thus engaged in the most difficult of all arts—the art of living together in a free society. It is comfortable, even if slothful, to live without responsibility. Responsibility is exacting and painful. Democracy involves hardship—the hardship of the unceasing responsibility of every citizen. Where the entire people do not take a continuous and considered part in public life, there can be no democracy in any meaningful sense of the term. Democracy is always a beckoning goal, not a safe harbor. For freedom is an unremitting endeavor, never a final achievement. That is why no office in the land is more important than that of being a citizen.

And we can say with all humility that the United States has a special destiny because its moral cohesion derives from a unique circumstance. No other nation has been composed of such heterogeneous elements. We represent a confluence of peoples whose bond of union is their common intrinsic human qualities. From its very beginning this country has bestowed upon those born under other skies the great boon of participation in its fellowship, with a single exception that created a moral lesion in the nation, requiring the healing forces of a civil war and its aftermath.

The saga of our republic is the story of the most significant racial and religious admixture in history. The fifty-six signers of the Declaration of Independence were men of varying religious outlook and eighteen of them of non-English stock. It cannot be too often recalled that when the Continental Congress chose John Adams, Franklin, and Jefferson as a committee to devise the national emblem, they recommended a seal containing the national emblems of England, Scotland, Ireland, France, Germany, and Holland, as representing "countries from which these States have been peopled."

Our cultural history—the sciences and the arts—reflects the genius and labors of men and women who came to these shores from all corners of the world. If a single faith can be said to unite a great people, surely the ideal which holds us together beyond any other is our belief in the worth of the individual, whatever his race or religion. In this faith America was founded; to this faith have her poets and seers and statesmen and the unknown millions, generation after generation, devoted their lives.

The opportunity which America has afforded implies the deepest obligations. What have those who have come here, beckoned by America's hospitality, made of this opportunity? Franklin Roosevelt gave the final answer. What he said on the occasion of the fiftieth anniversary of the Statue of Liberty was true of the stream of immigrants that came here before the Revolution; it is no less true of those who made their discovery of America more recently:

"I like to think of the men and women who, with the break of dawn off Sandy Hook, have strained their eyes to the west for a first glimpse of the New World.

"They came to us speaking many tongues—but a single language, the universal language of human aspiration.

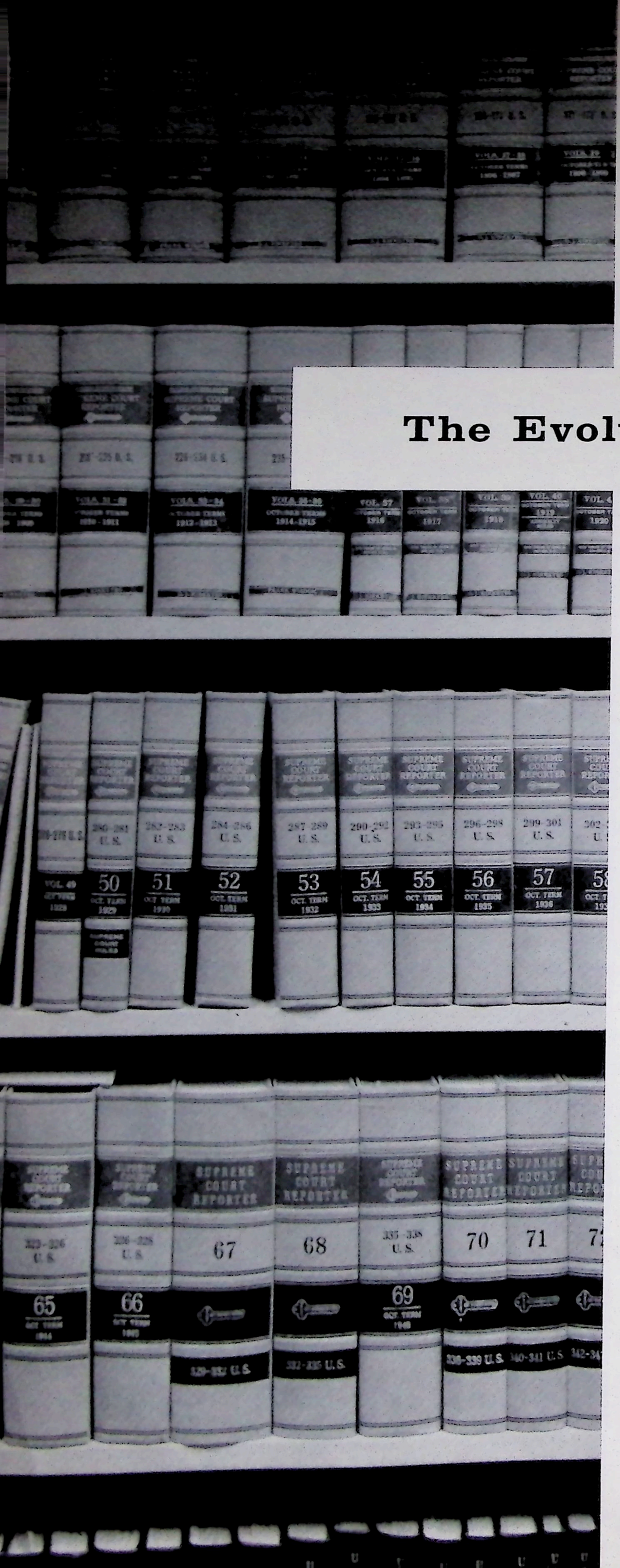
"How well their hopes were justified is proved by the record of what they achieved. They not only found freedom in the New World, but by their effort and devotion they made the New World's freedom safer, richer, more far-reaching, more capable of growth." *The Public Papers of Franklin D. Roosevelt, (1938).*

I shall not call the roll of the foreign-born and those who have been treated like aliens who, since this nation was founded, have performed distinguished service on the field of battle, in legislative halls, in executive offices, on our judiciary. For the ultimate heroes are always the unknown—the unnumbered, obscure people who have brought and today bring the dreams of America nearer to living truths.

This is our heritage. In confidence that their successors will maintain it the founders built this nation. That heritage is always endangered by inertia and complacency, by timidity and reluctance to keep abreast of the needs of a progressive society. This is a graver challenge than any from without. With active devotion to the ideals we profess it would be unworthy of our whole past to fear challenge by any rival system.

The upheavals of the war let loose forces from which hardly a corner of the world is immune. Over vast areas the very foundations of society have been shaken. Great events are in process, and great events must be met by greatly daring. The ultimate task of the statesmanship of today is to translate edifying precepts about the dignity of man into their progressive fulfillment.

You and I are heirs of a noble past. But . . . *what's past is prologue; what to come, is yours and my discharge.* ♦



First Chief Justice of the U.S. Supreme Court was John Jay (1745-1829).

The Evolution of American Law

by Henry Steele Commager

AMERICANS INHERITED THEIR LAW as they inherited their language and their political institutions. But where, with most institutions, inheritance was speedily modified by environment to produce something characteristically American, law successfully resisted environmental modification. Although in language or religion or the social structure, for example, Americanization meant acceleration of the evolutionary process, liberalization, and democratization, in law it meant arrested evolution and even reaction. Resourceful and ingenious in politics, Americans were content in the legal field to abide by familiar formulas. "It is revolting," Oliver Wendell Holmes was to write in 1897, "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," but for a century American judges, most of them trained in black-letter law, had found it not revolting but eminently proper. It came in time to seem something of an anomaly that American judges had abandoned so early the powdered wig of the eighteenth century.

In the realm of private law Americans took over the common law, and in the realm of public law the natural law. By the time of American independence the common law, itself the product of a long evolutionary process, had hardened into rigid, intricate, and artificial forms; and the growth of equity, designed to remedy the palpable inadequacies of the common law, was slow. It was no wonder that Federalists like Kent and Story and their successors should have found the common law congenial or that Jefferson should have thought it so pernicious that he fought, successfully, to deny common law jurisdiction to the federal courts and unsuccessfully to exclude Blackstone from his University of Virginia; nor was it remarkable that frontier communities should have regarded it with hostility and departed from it so frequently. "Ignorance is the best of law reformers," Justice Holmes said, and where the force of tradition was weak, professional standards low, and judges and lawyers ignorant, law was often confused with justice or common sense. The advance of civilization into successive frontiers, the weight of tradition, and the improvement of professional standards put an end to this scandal; and legal erudition, guided by such scholars as Nathan Dane and James Kent and Joseph Story, prided itself on preserving intact the anachronisms and mysteries of the common law.

The doctrines of natural law which were transferred to America were those dominant in England and on the Continent throughout the seventeenth and eighteenth centuries and given authoritative form by the great Blackstone. By the close of the eighteenth century, however, they were already suspect, and their sovereignty was shortly to be challenged and overthrown by the school of historical jurisprudence. But, transplanted to America, they took root and flourished; institutionalized in state and federal constitutions, they took on not only sanctity but permanence. Of all the social sciences, law retained longest its Newtonian character, resisted most successfully the impact of evolution and economic realism. The intellectual lag persisted into the twentieth century.

The strength and persistence of natural law concepts is one of the most arresting phenomena in American intellectual history, but it is not inexplicable. Americans inherited those concepts in the eighteenth century, found them wonderfully useful in the struggle against Parliamentary pretensions, and wove them into their own constitutional fabric as a matter of course. The neat formulas of a ready-made system of law, symmetrical in appearance and mechanical in operation, fitted well enough the simple needs of an eighteenth century society and furnished a convenient solution to what seemed the most pressing of all constitutional problems—the establishment of effective limitations on government. Their precepts erected into constitutional dogma and their authoritative interpretation entrusted to the least democratic branch of the government, they resisted all but judicial modification and frustrated all but extraconstitutional evolution. Their constitutional form gave them sanctity and invested them with a certain immunity from criticism, and the judicial gloss with which judges annotated them shared something of that sanctity: in time criticism of the natural law doctrines which judges read into the Constitution came to be looked upon as an assault upon the Constitution itself. No system of law was better fitted to restrict government to negative functions, to put property rights on a par with human rights, or to invest existing economic practices with legal sanction; and from the beginning the dominant forces of American economy gravitated to the support of natural law: slavery, corporations, and industrial capitalism. It was no accident that corporations should early take refuge in a natural law interpretation of the contract clause, that slavery should find protection in the natural law limitations of the due process clause, and that, after the Civil War, capitalism should persuade the Court to read into the Fourteenth Amendment natural law restrictions upon the police power of the States.

Along with conservatism in law went veneration for the Law—a veneration which was enjoyed vicariously by its high priests and oracles and even by its acolytes. Americans alone of western peoples made constitutionalism a religion and the judiciary a religious order and surrounded both with an aura of piety. They made the Constitution supreme law, and placed responsibility for the functioning of the federal system upon courts. The Supreme Court, in time, became the most nearly sacrosanct of American institutions—became to Americans what the Royal Family was to the British, the Army to the Germans, the Church to the Spaniards. Criticism was sometimes acrimonious but rarely disrespectful. In the mid-1930's, when conservatives were exhausting the vocabulary of billingsgate against the chief executive, those who criticized the Supreme Court were regarded as tainted with un-Americanism, and the most instructive lesson to be drawn from Franklin Roosevelt's fight for judicial reform was to be found in the outpouring of quasi-religious devotion to the Court which the hearings of the Senate Judiciary Committee evoked.

It was not a little curious that a people reputedly lawless should confess by their attitudes and their conduct the deepest respect for the Law, and that a people who had rejected alike the divine right of Kings and the unlimited power of legislatures should throw over their courts an aura of divinity and permit them the exercise of ultimate authority. The courts are, to be sure, creatures of the political branches, but they are creatures who grew more powerful than their creators; judicial review, required neither by law nor by logic except as a harmonizer of the federal system, was sustained and exalted by public opinion. In the United States alone of western nations the courts became the ultimate arbiters of political questions, and great issues of public policy were exposed to the hazards of private litigation. In the midst of the Civil War, the right of the president to resist disunion and treason was submitted to the judiciary and sustained by only five votes to four; in the midst of one depression, the right to impose income taxes—a right enjoyed by every other sovereign nation—was denied, and in the midst of another, authority to fix minimum wages, to bring order out of the chaos of the coal industry, and to establish a system of social security, all hinged on the outcome of private suits. Nowhere else except in Alice's Wonderland could a comparable situation be found. Yet so great was the respect for Law and for the Courts that public opinion not only tolerated this situation but took it for granted and even found in it cause for gratification. That "the Court will decide" became one of the axioms of American politics, acquiesced in even by legislative bodies who willingly abdicated their constitutional function in deference to the more powerful branch of the government.

Reverence for the law manifested itself in illuminating ways. It found expression in the tendency to substitute constitutional for political considerations in the formulation of policy—to discuss all questions in the vocabulary of the law, enmesh all problems in cobwebs of legal technicalities, and judge legislation by abstract standards of constitutionality rather than by pragmatic standards of wisdom or expediency. It dictated the emphasis placed upon the observation of precedent. *Stare decisis* was defensible on the ground that certainty in the law is more important than justice, but not even in England were precedents studied so religiously or cited so frequently as in the United States, and even in the realm of constitutional law, where the doctrine of *stare decisis* was never formally accepted, the most enlightened judges felt themselves bound by earlier decisions to vote against their own reason. It justified the tolerance for what Dean Pound has called the etiquette of justice—the delays, the technicalities, the ritual and ceremony, the mysteries of procedure, and the respect for the record. It helped explain the almost lawless passion for lawmaking: only a people confident that the solution to all problems was to be found in laws could enact so many of them, and if Americans no more expected their laws to be enforced than they expected their religion to be applied, it was as comforting to them to know that the laws were on the statute book as to know that the churches were open every Sunday.

The American attitude toward law in general was transferred, somewhat naively, to international law. Because the American federal system was, in interesting respects, an international one, the subject had from the beginning commanded American interest, and Wheaton had early made distinguished contributions to the study of international law and Story to the complex problem of conflict of laws. No other people appeared so confident of the power of law to preserve peace or were so zealous in contriving machinery for the control of international relations. The confidence, and the zeal, can be read in the enunciation of the Open Door Policy and in the various treaties, declarations, and agreements for the preservation of the integrity of China which proved, in the end, so futile. It can be read in Bryan's numerous cooling-off treaties; in Wilson's policy of non-recognition of governments that rested upon violence, his devotion to the "fine fabric" of

international law, and his Fourteen Points; in the Kellogg Peace Pact with its slightly premature renunciation of war as an instrument of national policy; and even in the neutrality legislation of the 1930's whereby Americans tried to talk themselves out of foreign involvements. Faith in the validity and efficacy of legal guarantees was creditable to the American character; when it took the form of gullibility, it was less creditable to the American intelligence. Creditable or discreditable, it was part of the larger pattern of American legal thought.

If it cannot be said that lawyers inspired veneration, it will not be denied that they commanded respect and exercised power. Hostility to lawyers had appeared in every community, at one time or another, and regularly in frontier communities: before the Revolution the Regulators of North Carolina had protested that "lawyers, Clerks, and other pensioners, in place of being obsequious Servants for the Country's use, are become a nuisance," and a generation later Kentucky boasted an anti-Court party. But more remarkable than the persistence of hostility toward lawyers was the regularity with which it was overcome. Where titles to land were unsettled, lawyers were essential; where an agricultural economy was being transformed into a commercial, lawyers were prosperous; where the interpretation of the Constitution was judicial, lawyers were dignified. "In America," wrote the astute Tocqueville in the 1830's, "lawyers form the highest political class and the most cultivated circle of society. . . . If I were asked where I would place the American aristocracy I should reply without hesitation that it is not composed of the rich . . . but that it occupies the judicial bench and bar."

The dignity, prosperity, and influence of the legal profession is one of the most striking phenomena of American culture. Surely in no other country have lawyers occupied a comparable position or played a comparable role. All but some ten American presidents were exposed, in varying degrees, to legal training, and of those customarily thought great only Washington and the first Roosevelt were wholly without benefit of law. In the first century of the history of the Republic, Judge Dillon has estimated, some two thirds of all Senators, over one half of all Representatives, and more than half of all state governors were lawyers. It is not without interest that during the Civil War the Secretary of War was a lawyer and the Secretary of the Navy had studied law; that during World War I the Secretary of War was drawn from the ranks of the law; and that in World War II Secretaries Stimson and Patterson of the War Department and Forrestal of the Navy were all lawyers. A comparison with English cabinet ministers for comparable periods would be illuminating.

Nowhere has the law been more faithfully cultivated, nowhere more assiduously studied. The Law School, like the constitutional lawyer, is an American institution, and no British or Continental university gives the training in law that a score of American universities provide as a matter of course. At a time when Sydney Smith was asking who read an American book, Joseph Story was recognized as the greatest legal scholar in the English-speaking world, and whatever may be the judgment on American scholarship in general, no one familiar with the *Harvard Law Review* and the *Yale Law Journal* can doubt that in those fields of legal scholarship which are not antiquarian American is pre-eminent.

It is a tribute to the position of the lawyer that no other profession has inspired such a literature, or such a mythology, as the legal. Lawyers are legendary characters, their careers and their arguments the very stuff of folklore: who does not know how Marshall invoked his jurisdiction over the whole United States to justify bringing out the Madeira; how Lincoln summoned the moonlight to clear a client from the charge of murder; how Webster outargued the Devil himself? The glories of the law are celebrated in a hundred volumes on the Bench and Bar, but who ever heard of volumes on the clergy, teachers or architects of Franklin County?

As lawyers took over politics and, to a large extent, business, so legal ideas and attitudes permeated most aspects of American thought. What Tocqueville observed in the 1830's was equally true a century later:

"Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow the ideas, and even the language, usual in judicial proceedings in their daily controversies. As most public men are, or have been, legal practitioners, they introduce the customs and technicalities of their profession into the affairs of the country. . . . The language of the law thus becomes, in some measure, a vulgar tongue . . . the spirit of the law gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that the whole people contracts the habits and tastes of the magistrate."

This influence, so pervasive and so powerful, was, naturally enough, a force for conservatism, for law is by its very nature conservative, and most of its disciples gladly share its nature. Again the insight of Tocqueville—himself, it should be remembered, a magistrate—was prophetic. "It must not be forgotten," he wrote of lawyers, "that if they prize the free institutions of their country much, they nevertheless value the legality of those institutions far more; they are less afraid of tyranny than of arbitrary power." The invention by the legal fraternity of the fiction of liberty of contract—a fiction designed to safeguard the right of working men and women to contract for any hours, wages, and conditions that they saw fit to accept; the diversion of the Fourteenth Amendment, and especially of its due process clause, from its original purpose of protecting the rights of freedom to its derivative purpose of protecting the rights of corporations; the hostility of the legal profession to almost every item of social welfare legislation from the income tax and tenement house reform to workmen's compensation and minimum wages, is a familiar story. From the days of Jefferson's "assault on the judiciary," almost every liberal has found it necessary to attack the misuse of the judicial prerogative, and almost every reform movement has included some measure designed to curb judicial pretensions.

The doctrines of natural law were deeply rooted, plausible, and tenacious. They derived from Greek and Roman philosophy, were fortified by medieval Christianity, and vindicated by Newtonian science; tested in the crucible of seventeenth century English and eighteenth century American revolutions, they appeared to justify themselves. Intellectually their appeal was almost irresistible, for they taught that law was rooted in the very nature of things, articulated to the framework of the universe, and expressive of the will of God, that it operated with the mathematical certainty of the axioms of Euclid, and that conformity to it was a duty of Reason. Emotionally, too, their appeal was persuasive. They offered a formula at once simple and conclusive and asserted the harmony of man with the universe; in a world of change they provided permanence, and in a world of disorder security.

The Fathers of the Revolution and of the Constitution embraced the tenets of natural law as a matter of course. A generation trained on the classics could quote Aristotle's definition of law as "reason unaffected by desire" and Cicero's conclusion that "law is the highest reason implanted in nature, which commands what ought to be and forbids the opposite." A generation which drew inspiration for its own Revolution from the deep wells of seventeenth century English philosophy was familiar with that long line of argument from Harrington and Coke, Milton and Locke, which held that Nature had set impassable bounds to the ambitions of rulers and that, in the words of Hobbes, though:

"Princes succeed one another, and one judge passeth, another cometh; nay heaven and earth shall pass, but not one tittle of the law of nature shall pass, for it is the eternal law of God." A generation still deeply imbued with Puritanism knew that religion itself dictated conformity to the laws of Nature, for, as Jonathan Mayhew put it, "God himself does not govern in an absolutely arbitrary and despotic manner. The power of this Almighty King is limited by law—by the eternal laws of truth, wisdom, and equity, and the everlasting tables of right reason." A generation which read the *Commentaries* of Blackstone recalled that "upon the law of nature and the law of revelation depend all human laws; that is to say, no human laws should be suffered to contradict these," and rejoiced that the laws of England, happily transferred to America, were patterned on the laws of nature. A generation bathed in the Enlightenment pledged its lives, its fortunes, and its sacred honor to the conviction that the laws of Nature and Nature's God required American independence and justified faith in the unalienable rights of life, liberty, and the pursuit of happiness. It was not surprising that Americans wrote natural law into their constitutions, enshrined it in their Bills of Rights, and pronounced it from their judicial tribunals.

According to the philosophy of natural law, laws are discovered, not made. They are deduced from the nature of things rather than patterned on the needs of man. In the first half of the nineteenth century, under the impulse of new forces of nationalism and under the leadership of men like Savigny in Germany and Sir Henry Maine and James Stephen in England, natural law gave way to historical jurisprudence. The change seemed important, but its importance was quantitative rather than qualitative, a shift in the point of departure rather than in the conclusion. For the historical school, too, held that law was discovered, not made. If it no longer found law in the reverent contemplation of nature, it read it, no less reverently, from a contemplation of the past. And if the principles that emerged from this inquiry were no longer held to be of universal validity, their validity for the particular people or nation which had produced them was no less compelling. It is an interesting question whether more was not lost by the abandonment of the principle of universality, however fictitious, than was gained by the capitulation to the forces of particularism, however compulsive.

Historical jurisprudence was evolution applied to law, but it was not an evolution which afforded grounds for a belief in progress or which left room for reform. It was rather like that Spencerian version of evolution which condemned human institutions to the slow and inexorable processes of natural determinism: it merely substituted history for nature. From the sound argument that law was a product of a long historical process the historians drew the unsound conclusion that it could be nothing else. They found law in the slow processes of history and tradition, in the customs and habits of peoples, in the *Volkgeist* and the *Zeitgeist*. Legislation, they held, could at best explain and elaborate law, it could not alter it, and they were inclined to look upon legislators as lay intruders into sacred mysteries. Their evolution was pre-Huxleyan and left no room for the interposition of human intelligence; it was pre-Mendelian and made no allowances for sports. It was not progressive but static and even reactionary.

Instead of being revolted to find the reason for a law that "so it was laid down in the reign of Henry IV," the historians were gratified to find an antecedent so respectable. They delighted in precedents, in the religious observation of old forms and customs, in the study of black-letter law, and they preserved reverentially the barbarous Latin and French terminology and the anachronistic "words and phrases" that baffled the layman and confounded the logician: in the mid-twentieth century, students still looked up labor law under the heading "master and servant." Like the disciples of natural law the historians took refuge in abstractions, only theirs were the abstractions of Society, Custom, and History rather than the Cosmic Processes.

So strong was the hold of natural law on the American imagination that historical jurisprudence penetrated only slowly, and when it came it rather merged with natural law than supplanted it. It is suggestive that though in such men as John Adams and James Wilson, John Marshall and Edward Livingston, America produced natural law jurists who compared favorably with their English and Continental contemporaries, there was no American Savigny. Nor did historical jurisprudence, when it came, follow the familiar Continental and British pattern of nationalism. For there was, in fact, no American legal past to explore, no corpus of practices and traditions to mold into customary law: though American legal scholarship has been both profound and prodigious, no Maitland or Holdsworth has yet written a history of American law. Of necessity the American historians turned to the common law, cultivating the rich fields of English rather than the supposedly barren fields of the American past. Except on the frontier, and among radicals like Jefferson, the political break with the Mother Country did not involve even strained relations among the jurists; the law retained its colonial status long after language and literature, religion and education, architecture and painting, had announced their independence.

Joseph Story best illuminated the transition from natural to historical law. He was, no less than Marshall, a product of the age of reason, and he knew that there were "eternal principles of right and justice" which controlled legislative authority and dictated judicial opinions. But he was, too, a man of massive learning, a scholar almost by instinct, an antiquarian by inclination, and he was rarely willing to content himself with those exercises in logic that satisfied his brother Marshall. His monumental opinions were grounded on Nature and constructed of rugged blocks hewn from the quarries of History. Where, for example, in the Dartmouth College case Marshall confined himself to general principles, proceeding imperially from unsound assumptions that seemed plausible to misleading conclusions that seemed irrefutable, Story rested his case on a formidable body of historical antecedents, ransacking history to prove the immunity of charitable foundations from public control. This was not a singular instance of an opinion which was an historical treatise: *De Lovio* vs. *Boit*, for example, was the most exhaustive treatment of admiralty jurisdiction which had been written up to that time. It was entirely natural that the scholar who compiled twenty volumes of *commentaries* that were like judicial opinions should have written opinions that were like commentaries. Like the Continental historians, Story was both a conservative and a nationalist. His consciousness of the place of precedent, custom, and tradition made for a conservatism which became, in time, mere petulance. But it made, too, for an appreciation of the importance of historical processes which, in the field of politics, was to be profoundly constructive. Conservatism would have triumphed even without Story's contributions, but the triumph of nationalism owes much to his awareness of the creative force of history.

Historical jurisprudence left less scope for public contributions than natural law, for whereas the laws of nature could be read by any reasonable man, the laws of history were to be deciphered only by the initiated. Under its auspices the gap between the layman and the lawyer broadened steadily: law became more scholarly but less philosophical, more specialized but less humane; it became increasingly a private thing, the exclusive province of the jurisprudent, remote from reality, living upon itself and upon its past. The professional view was admirably expressed by E. J.

Phelps, in 1879 president of the American Bar Association: the Constitution, he asserted, belonged to the bench and the bar, not to the people. It was not a proper subject for political discussion; it was too sacred to be "hawked about the country, debated in the newspapers, discussed from the stump, elucidated by pot-house politicians and dunghill editors, or by scholars . . . who have never found leisure for the grace of English grammar or the embellishment of correct spelling."

Perhaps the best representative of the school of historical jurisprudence during the transition years of the end of the century was James Coolidge Carter, eminent corporation lawyer and author of a once popular but now universally unread study of *Law, Its Origins, Growth and Function*. Law, Carter held, is a series of rules growing out of customs and experience and found and applied by judges. An esoteric subject, its discovery and application was best left to judges experienced in the business. Writing a decade after Judge Holmes had pointed out that "the very considerations which judges most rarely mention, and always with an apology, are the secret roots from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned," Mr. Carter put Holmes in his place. "That the judge cannot make law," he said, "is accepted at the start."

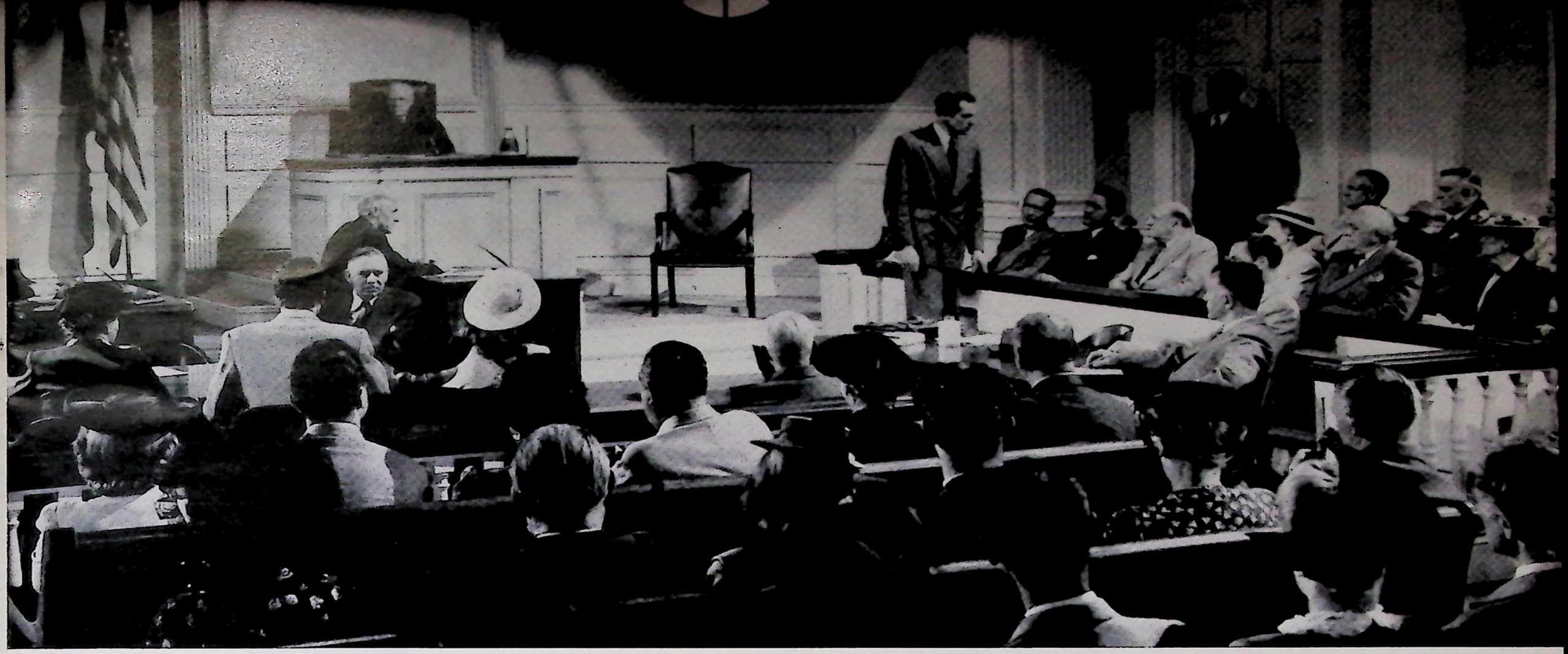
There was nothing here about considerations of public policy or of expediency but merely a restatement of the hackneyed doctrines of natural law and historical jurisprudence. A somewhat less eminent practitioner of the law, but one who was more familiar with considerations of expediency, put the matter even more succinctly. Writing in 1919, the year before he won a famous victory over the Boston police, Calvin Coolidge pointed out that "Men do not make laws. They do but discover them. That state is most fortunate in its form of government which has the aptest instruments for the discovery of law."

That was the year after *Hammer* vs. *Dagenhart* and the year of *Abrams* vs. *United States*, two cases in which the Supreme Court showed how it operated as "the aptest instrument for the discovery of law." In the first the Court discovered that the commerce clause of the Constitution did not authorize congressional regulation of the shipment of products of child labor in interstate commerce; a quarter-century later the Court discovered that it did. In the second case the Court discovered that the Bill of Rights did not protect an agitator who expressed unorthodox opinions in wartime; with the subsequent adoption of Justice Holmes's clear and present danger test, this discovery, too, was repudiated. It was all very confusing to those who subscribed to Calvin Coolidge's neat theory of mechanical jurisprudence or to James Coolidge Carter's doctrine that there already existed some rule of law which implacably determined what judges were required to decide.

For half a century the courts, under the leadership of jurists like Field and Brewer and Sutherland and of lawyers like Carter and Choate and Depew, abandoned themselves to delusions of mechanical jurisprudence, interpreting the Constitution as a prohibition rather than an instrument, reading into it limitations on the scope of governmental authority which existed only as abstract conclusions of natural law syllogisms. Insisting that they were without discretion and that their functions were purely mechanical and phonographic, judges struck down literally hundreds of state police laws on the theory that they deprived somebody of property or of liberty of contract without due process of law. Two characteristics distinguished most of these decisions. First, they assumed that the provisions of the Constitution were axiomatic, inflexible, and crystal clear, and that the judges were the only persons competent to find those provisions and to apply them to particular cases. Second, they held that whenever social or economic facts conflicted with the theoretical assumptions of natural law, the facts must give way to the assumptions. For though judges acknowledged readily enough that, notwithstanding the alleged clarity of the Constitution, neither property nor liberty nor due process could be defined, they preferred their own Newtonian definitions to the pragmatic definitions of legislative bodies.

The triumph of mechanical concepts in the juristic arena coincided with the triumph of dynamic progressivism in the political. The result was a conflict which increasingly exacerbated the relations between the political and judicial branches of the government and between the various parts of the federal system and all but brought political evolution and experimentation to a standstill. Put in political terms, the conflict was between conservative courts and progressive legislatures with the courts exercising the veto power. Put in legal terms, it was one between the commerce power of the federal government and the police power of the states, on the one hand, and the due process clauses of the Fifth and Fourteenth Amendments, reinforced by some dependence on the Tenth Amendment, on the other, with the judiciary enjoying the privilege of ultimate interpretation.

That the courts exercised that privilege cannot be doubted by anyone familiar with the judicial record from the mid-1880's to the 1930's. For four or five decades the political field was strewn with the corpses of social welfare laws struck down by judicial weapons. The story is too familiar to justify rehearsal in detail and examples are pertinent only as they illustrate the hold that natural law and historical concepts had on the judicial mind. A Pennsylvania act forbidding the payment of workers with orders on company stores was voided as an "infringement on natural inherent rights and an insulting attempt to put the laborer under a legislative tutelage," and the West Virginia court, confronted by a similar act, held that "the evil was in the hands of the employee since he is not compelled to buy from the employer." A New York act fixing the hours of labor of municipal contracts was struck down because it "created a class of statutory laborers," and a Colorado act regulating hours in the smelting industry was voided as an interference with labor's liberty of contract. The New York Supreme Court nullified an act forbidding manufacture in tenement houses because it could not "perceive how the cigarmaker is to be improved in his health or morals by forcing him from his home and its hallowed associations and beneficent influences to ply his trade elsewhere." An Illinois court struck down a statute limiting the hours of labor for women in sweatshops on the ground that women had the same liberty of contract as men, and a New York court, faced with a sixty-hour law for women in industry, held that it was "discriminative against female citizens in denying them equal rights with men in the same pursuit" and "an arbitrary interference with the right of an adult female from working at any time of the day that suits her." An Ohio ordinance providing allowances to the indigent blind was nullified on the ground that "innumerable cases may clamor for similar bounties, and it is doubted that any line could be drawn short of an equal distribution of property." The New York Supreme Court voided a workmen's compensation law because it "did nothing to conserve the health, safety or morals of employees." And it was a New York court, too, which in voiding a sixty-hour week for labor in bakeshops on the ground that bakers were competent to make their own contracts, provoked Justice Holmes' famous retort that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*." The observation has been frequently quoted, but it has not been sufficiently remarked that at the time he spoke Justice Holmes was obviously wrong. ♦



LAWYERS, LAYMEN AND LAW

by Max Radin

WE ARE NOT LIKELY to see persons parading the streets with great placards bearing the words "Kill the Lawyers!" This did happen, however, in the streets of American cities shortly after the Revolution. And if we go back farther in history, we find that whenever a popular insurrection took place in medieval England, the persons whom the rebels most wanted to kill—and often did kill—were the lawyers.

I suppose the lawyers of today are in no danger of being killed, even if there should be a popular outbreak—at least in no more danger than other persons. But there is one fact about which the lawyers themselves have no illusions. If they are in no danger of being killed, it is not because they are loved and venerated.

No one loves lawyers. No one ever did love them. There are probably more disparaging stories told about lawyers than about members of any other profession. If a lawyer appears in a play or in a story, it is almost inconceivable that he will be the hero of it. If he is not represented as a downright rascal, he is almost never a wholly admirable figure, except occasionally in the novels of Walter Scott, who was himself a lawyer.

But there is a curious qualification to all this. The lawyer may never be the hero but, if cast for the role of the villain, he will usually be a sort of comic villain. The stories told to the disparagement of lawyers are in most cases funny stories. There is a tone of conscious and intentional exaggeration about them which appears even in the furious attacks that Swift makes on lawyers in *Gulliver's Travels*. Lawyers seem to be the natural butts for caricature and satire.

Why should people dislike lawyers so heartily, or at least pretend to dislike them so? Why did they dislike them in times past? It would be easier to answer the latter question than the former. A few centuries ago in England and generally in Europe, lawyers belonged to a highly privileged corporation. It was quite natural that all members of privileged classes should be disliked by the great mass of unprivileged people. This applied to the clergy, and it applied to physicians, who also were privileged and also belonged to a guild set apart from the rest of the community.

But at present physicians have in some manner overcome this dislike. At all events, if there is a feeling of antagonism against doctors, it is slight compared to that which exists against lawyers. Neither lawyers nor doctors belong to a privileged caste any more and, of the two, the lawyers are certainly the more numerous, and one would therefore suppose they should be the more popular. This is obviously not the case. Evidently the dislike of lawyers must be based on something else than the mere fact that the lawyer belongs to a profession set apart from the rest of the community.

To do laymen justice, they are likely to be very specific in the statement of their reasons why they dislike lawyers. Popular stories and proverbs, popular songs and anecdotes, bring out the point clearly. Lawyers do not tell the truth. They cannot tell the truth. They are paid not to. Lawyers are dishonest. If any money or property passes through their hands—money or property which belongs to their clients—they keep most of it for themselves. They form a kind of association among themselves which they regard as more important than the interests of their clients. And even when they do not do any of these things, they charge such high fees that it is better to submit to injustice than to get justice with the help of lawyers.

Now, it can be said at once that most of these charges are not

true. More than that, most sensible people know they are not true. and when they repeat these ancient accusations they do so half-jestingly, with conscious exaggeration. The great majority of lawyers are completely honest in their dealings with their clients. Cases in which they retain the property of their clients are extremely rare; and, so far from sacrificing their clients' interests to what they think are the rules of the profession, a complaint often made is that they do the opposite. And as for the fees they charge, these are not, as a matter of fact, larger proportionately than fees paid to other professional men. On the contrary, competition among lawyers is greater than in other professions and there are more cases of cutting under the standard fees by lawyers than by doctors or dentists or engineers.

Clearly the real reason for the dislike of lawyers is a different one, which shows itself in so many ways that there can be little real doubt about it. People resent the existence of lawyers as a profession in a way they do not resent the existence of any other specialized profession. They do not see why there should be any lawyers at all. They do not resent the existence of physicians and surgeons and dentists, although they grumble at the fees they must pay for their services. They rarely suppose they can get along without them. They do not resent the existence of trained engineers. It is not everybody who can design and construct a bridge. But what do lawyers do, that anybody else could not do? And this resentment is particularly strong whenever attention is called to the fact that the law is supposed to have justice as its end. Every man feels as King James I did on the memorable occasion when the judges were summoned before him. "Does not everyone know as much about reason and justice as the lawyers?"

And the ordinary person will be as little satisfied as King James was with the answer given by the judges, that the reason and justice of the law was not the ordinary reason and justice, but an artificial one, which only specially trained persons can understand and apply. Who wants this artificial reason and justice? Who gave the lawyers the right to set it up? Why cannot a man go to court, tell his story to the judge, meet the objections and arguments of his opponent as he would if he argued at his home or in his club? If he wishes to appeal to a higher court, why can he not argue for justice and reason and common sense before the judges of the appellate court? Why must everything be bound up with a quaint, complicated phraseology, in which words and phrases are used that are not used elsewhere, so that it takes pages to say what can be said in a single sentence? And in legal arguments why cannot people argue on the basis of right and wrong instead of citing "cases" decided by other judges, sometimes ones decided hundreds of years ago?

That is the real complaint of the lay public against lawyers. It is asserted that they are in fact completely unnecessary and have made themselves necessary only by inventing a jargon that no one can use but themselves and by having very complicated methods of doing very simple things. Since you cannot get justice except by using this jargon and following this complicated procedure, you must pay money to a lawyer to use it for you. The "artificial justice" of the lawyers turns out to consist in deciding not who is right, but who has used the jargon better or followed more closely the terribly and foolishly complicated procedure.

Evidently there are a great many factors mixed up in all this. Right and wrong, just and unjust, are not so easy to tell apart as sometimes imagined by people who think themselves ill-used. But in any case, it might be asked, why should lawyers talk in a way that other people do not talk, and why should ordinary argumentation have no effect on them, while an absurd value is given to the citation of cases?

So far as lawyers' jargon is concerned, a great deal of it at the present day is in fact quite unnecessary, not only from the point of view of laymen but also from the point of view of lawyers. Nevertheless, it must be admitted that not so very long ago this jargon was extremely important. If anyone made a will, he had to get a lawyer to do it, even in quite simple wills, because there were a great many words that meant one thing in lawyers' jargon and quite a different thing in ordinary speech. If you wanted to buy or sell a house or rent or let one, you had to be quite sure that certain words were used in the documents, although in ordinary speech they would be unnecessary. If you wanted to bring an action, it was next to impossible to use the right words, unless you were a lawyer, and yet the matter you complained of might be quite simple. And it was pretty certain that if you made a mistake you would not only get nothing but would have to pay costs, even if it was admitted that you were justly entitled to what you asked for.

That is no longer true. If a man makes his own will or makes a deed to his house, or even if he draws up a complaint in a lawsuit himself, the court will try to make out what he wanted to say, although he used only everyday, common phraseology and never employed a single word of the lawyers' jargon that irritates people so much. The only difficulty is that people are much less capable of putting down on paper what they mean than they suppose. They know what they meant to say, and when the court, looking at what they have written, understands it in a different way, they are angry at the court's not seeing a meaning that only they themselves understood.

The value of a lawyer at the present day lies in his capacity to do what inexperienced persons obviously cannot do. In the first place, he ought to possess to a special degree this very capacity of putting things down clearly and precisely, so that the words will mean what he wishes them to mean and no more. Then, too, he ought to know the difficulties courts often find with documents, and he ought to be able to avoid these difficulties.

Laymen have always dreaded legal procedure. It is so very complicated. There are so many requirements. The requirements are so very precise. And it takes such a long time. It is quite true that these rules are generally in books called the *Code of Civil Procedure* and the *Code of Criminal Procedure*, where anybody can read them. But these books are pretty thick volumes, and no layman would trust himself to be sure that he has not omitted some little act which is essential and without which the whole procedure is invalid.

The only defense that lawyers can make for the existing complication of procedure is that they have greatly simplified it within the last hundred years and are constantly planning further simplifications. If lawyers had their own way about it, and did not generally have to get the consent of a legislature representing public opinion, they would perhaps have simplified procedure far more than is already the case. But while lawyers have done much about this ancient and very real grievance of laymen, they have still a great deal to do. Far too many cases seem still to depend on points of procedure, although we must remember that deciding a case on a point of procedure is often a way out for the court. It may enable it to avoid the "hard case" without making the "bad law" of which it is in such dread.

Still, after all, it is neither the way lawyers talk nor the way lawyers act that is the real source of the prejudice against them. The real and permanent difficulty is that everybody is sure he knows what justice is; he sees no reason why he should need expert assistance to get it, and why, even if he gets it, he should have to pay heavily for it.

It is curious that paying for legal services should seem so different from paying a physician a fee for medical attendance or paying

a carpenter for repairing a broken chair. It is quite true that these are accidental misfortunes. And while it costs money to remedy them, we make the payment without feeling defrauded. But slipping on the pavement and breaking a leg is not essentially different from falling in with a customer who after getting your goods will not pay. It will cost you a fee to remedy the loss this occasions you, if it can be remedied at all, and the fee is no more an unconscionable imposition than the fees that are paid for similar services to other professional persons.

Lawyers are not priests. They are not magicians. They are not even expert mechanics. When Smith asks his lawyer what the law is on this subject, and whether he can get legal redress, he is asking him to prophesy what a particular court will do. The "best" lawyer is the one who most frequently prophesies correctly.

We could get along without lawyers if we could get along without courts. We could get along without courts if we went back to our Happy Island where there is enough for everybody and no one wants what his neighbor has. But, with conditions as they are, we had better resign ourselves to the fact that we are not likely to do this within the next generation. So we shall have to learn to bear with the lawyers, who seem to be fairly indispensable.

Judges are selected from lawyers. Therefore, the better the lawyers in general are, the better the judges will be. But it also works the other way. The better the judges are, the better on the whole will be the lawyers whose task it is to predict what the judges will be likely to do. However, the word *better* is used here in a sense different from the sense in which we use *best*. Then the word *best* merely meant successful. The *best* lawyer was the lawyer who by chance or shrewdness in any particular place conjectured with the most success the behavior of the judges in that particular place. But when we use *better* in the sense of better judges and better lawyers, we have something else in mind.

Better here means better in all the qualities that make good men and good citizens, and particularly those which are associated with intelligence and human sympathy. Merely to have good will, and kindness, and desire to do well, is not enough; it is very far from being enough. There is a demand made on the judge's intelligence by the mere mass of material which he must keep and organize in his mind. He must estimate the extent to which logical consistency should be given to all this material and to the decisions which he adds to it. And intelligence is still more necessary in trying to discover just what justice is and how it is to be applied. A considerable knowledge of his fellow men and a considerable acquaintance with what is happening in all the elements of human society are quite as much a requisite as a knowledge of past law, which is at best only one of the guides upon which judges must rely.

That is particularly so when justice involves the difficult and delicate question of public policy. Strictly speaking, the judge might be supposed to have no business with public policy. The question before him is always specific. Shall Smith get the money or shall Scroggs keep it? Shall Benny go to jail or go free? But there are many occasions when justice depends, not on what does or does not happen to the people before him, but on treating the situation as a typical one. That is not because the decision will be a precedent for other judges, but because an intelligent person in his dealings with recurring situations wishes to deal with them in the same way.

The occasions to which I refer are usually those which involve matters of the economic organization of society, matters of taxation, of the distribution of wealth, of the management of national resources, of the conflicts between employers and employees. All these things are in part regulated by statutes, but the statutes are generally phrased so that there is more or less doubt as to just how far they limit the action of the court. The court consists of men. Can they avoid having their own opinion on these policies? Should we like them to have no opinions? It is hard to imagine intelligent men who can be prevented from having opinions.

Naturally, if they have opinions about the right or wrong policy of certain economic movements, that certainly will guide their decisions, whenever questions of public policy are at stake. Evidently the best judges from this point of view are those who have the best policy. And it is quite natural for people to regard a policy as good only if it agrees with their own.

Accordingly, the judges who in popular feeling will be the best judges are those who in these economic issues have a popular policy. Those judges who defend an unpopular policy are quite justified in disregarding popular feeling, but they are not better judges for doing so, unless their policy is really better—that is, can be shown to reasonable people to be better than the policy that the general mass of people support.

At any rate, even if they convince themselves that it is better, it is not a healthy condition when the policy of the courts, which is a part of the law, is in too many ways different from the policy approved by the people. Judges often realize that, and when the policy which is generally approved is clear, they may well feel that it has the same force as an unmistakable statute. In the United States, the fact that judges are (for the most part) elected by the people makes it certain that popular sentiment will not be altogether disregarded.

In such matters the task of the lawyer becomes doubly difficult. If judges all belonged to a single class of men, he might estimate their policy by what is currently regarded among members of their class as a desirable organization of society. But judges do not belong to a single class. And while the lawyer might in ordinary matters persuade the judge how to interpret statutes or select precedents or discover justice, he will only in extremely rare cases be able to convince a judge that the judge's idea of a proper social and economic policy is wrong.

Let us take the example of England, whose system of law and whose court organization are so nearly like our own. A large part of the population—almost all the working classes—belong to the Labour Party; that is to say, they are Socialists. The great majority of judges are still landed proprietors and members of the upper class. They are certainly not Socialists. That means that there is a wide conflict between what the courts think is a wise economic policy and what the laboring classes do. The latter are, therefore, extremely suspicious of the decisions of judges whenever there is even a slight chance that the decision has been determined by the judges' policy; and the fact that the judges are upright, able, learned, and sincere will not make their decisions in these matters any less open to suspicion.

But we must not lose sight of the fact that what has just been said applies to only a fraction of the average judge's activity. Most questions before him have nothing directly to do with economic or social policy. As to this great majority of questions, the processes through which he goes have been explained, so far as they can be explained within so brief a compass. On such questions, the growth of the law and the discovery of justice will be furthered by discarding the unreasonable attitude of irritation and suspicion on the part of laymen which has its source in wrong conception of what the law is and what lawyers are trying to do. But it will also need a sharp analysis by lawyers and courts of their own functions and a frank recognition of the limited character of their social effectiveness unless they are willing to be more than lawyers. ♦

HIGH DRAMA IN THE HIGH COURT

In no other nation on earth does a group of judges hold the sweeping political power—the privilege in practice, not just in theory, of saying the last governmental word—that is held by the nine U. S. Supreme Court Justices.

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by Anthony Lewis

GRANDIOSE, INTIMATE; ritualistic, informal; austere, human. These paradoxical terms pass through the mind of the observer as he surveys the scene in the Supreme Court of the United States.

That drama—the process of the Court at work—does not ordinarily attract much public attention. It is only the critical moments, like the extraordinary sessions on Little Rock this summer that bring general awareness of the fascination and the significance of the courtroom spectacle.

The disclosure of the justices' mood in the oral arguments on the Little Rock case made plain how significant for the final result the courtroom proceedings may be. But watching the justices at work is not only education, but entertainment. The Supreme Court offers, from time to time, as good a public show as anything in Washington except an occasional Senate session.

Grandiose is the word for the external setting. The W.P.A. guide to Washington called the Supreme Court building a "great marble temple" which "by its august scale and mighty splendor seems to bear little relation to the functional purposes of government."

Shortly before the justices moved into the building in 1935 from their old chamber in the Capitol, Justice Stone wrote his sons: "The place is almost bombastically pretentious, and thus it seems to me wholly inappropriate for a quiet group of old boys such as the Supreme Court." He told his friends that the justices would be "nine black beetles in the Temple of Karnak."

Justice Brandeis would never set foot in the office assigned him in the new building. Prof. Paul A. Freund, his former law clerk, explains: "He felt that the authority of the Court must come from the intrinsic strength of its work and not from the trappings of imprimatur of power. A marble palace, he thought, would not be conducive to the spirit of humility befitting those whose title to govern rests on the power of reason."

Passing the columns and statues of the huge pseudo-classic facade, the visitor walks a cold marble corridor to the courtroom. Here again the impression is one of austere pomp—pillars, red velvet hangings, an enormously high ceiling, friezes carved high on the walls.

The ritual opening of every day's session adds to the atmosphere of awe. The justices gather in the robing room in back of the red draperies behind the bench. People sitting near the front of the room can hear the hum of their talk.

Then a buzzer sounds at the marshal's desk to the right of the bench, the court crier smashes his gavel loudly on the desk, spectators rise and the justices file in. As they stand in black robes at their places, the crier intones the traditional phrases ending, "God save the United States and this honorable Court."

In such a setting the remarkable thing is how informal—almost cozy, one might say at times—an oral argument before the Supreme Court of the United States can be.

An Alabama labor lawyer had talked for about fifteen minutes last winter when Justice Felix Frankfurter peered over the bench and asked: "Is that all there is to this case?"

"No, sir," said the lawyer. "There's a heap to this case."

"As you state it," the justice came back, "it's so simple that I'm suspicious. What is the milk in the coconut?"

The milk turned out to be an assertion by the lawyer that unions covered by Federal labor law had a right to be free of damage suits by employees who had been kept out of plants by violent picketing. He lost his case, 6 to 2.

Oral argument is both the most important and the most inter-

esting aspect of the relatively small portion of the Court's work that is in public view. It can win or lose cases, it exposes the personalities of court and counsel and it conveys a continuing sense of the Court as an institution.

The lawyer stands at a small rostrum just below the center of the bench, with counsel tables on each side and spectators behind him. On the lectern is a white light that flashes on when he has five minutes to go and a red light that tells him his allotted time is over. The regular time for each side is an hour; in some cases this is cut to half an hour.

In more spacious times a Daniel Webster could go on for days. And citations of God and country were good form. The lawyer is well advised to be simple and direct. And, perhaps surprisingly, he might well emphasize the facts rather than the law of his case. The justices of the Supreme Court, so remote from trials, seem lonesome for concrete details.

Rule forty-four of the Supreme Court says: "The court looks with disfavor on any oral argument that is read from a prepared text." Informality, even spontaneity, is preferred, but any lawyer knows that to be effectively spontaneous he must be really well prepared on his case.

It would be nice to report that the average Supreme Court argument is well prepared, informative, persuasive. Unhappily, it is just as likely to be a dreary, wandering affair. The American bar simply does not have England's great tradition of oral advocacy.

However good an argument seemed in anticipation, its character is bound to change under the impact of the justices' questions. These questions may be few, but they are more likely to come by the dozen.

Some lawyers grieve because they are interrupted by a question before they finish their first polished sentence. But they might better take the interest of the justice as a compliment and be resilient enough to satisfy it. For, as Justice Frankfurter has written, the Court is "not designed as a dozing audience for the reading of soliloquies but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them."

The justices' questioning techniques, and the importance they place on questions, vary widely.

The Chief Justice, who carries special weight because of his position, is likely to be bland and polite unless he thinks he is getting an evasive answer; then he can be relentless. Justice Black's voice is gentle, but his questions are powerful and dangerous to handle. Justice Frankfurter, the most frequent speaker from the bench, is sharp and witty, offering observations as well as questions. For example, he told one lawyer last term:

"You think there's nothing in the point. But I'm sometimes surprised at how often a majority of my colleagues thinks there is something to a point when I do not, or vice versa."

Things were not always so informal. Senator George W. Pepper recalled in 1956 that, when he came down to make his first argument in 1892, he was at first refused admission to the bar of the Supreme Court because he was not properly dressed. Justice Horace Gray whispered to one of his colleagues: "Who is that beast who dares to come in here with a gray coat?"

Young Mr. Pepper borrowed a morning coat, and all was well.

Nowadays they still have quill pens at the counsel tables. (Lawyers take them home as souvenirs for their children.) But just about the only men to appear in striped trousers and cutaways are the Solicitor General and his staff.

The Solicitor General's office is a special case, anyway. It includes an extraordinarily able group of lawyers who appear more regularly before the Supreme Court than anyone else and hence know it better.

The Solicitor General, now J. Lee Rankin, carries a special responsibility for frank dealings between the Executive Branch and the Court. But frankness isn't all. Professor Freund recalls the occasion when Justice Holmes complimented a Solicitor General on his candor. As the gentleman began to preen himself, Justice Holmes added: "You know, candor is one of the most effective instruments of deception."

When all is said and done, can oral argument really make the difference in a Supreme Court case?

Those who heard Senator Pepper argue the A. A. A. case say his argument alone won it—and drew from the Court one of its most bitterly criticized anti-New Deal opinions. Today it would be a rare thing for eloquence to win a case, but almost everyone agrees that incompetence can easily lose one. And the justices themselves have said publicly that the shaping of issues in argument helps to determine the analysis followed by the Court's opinion writer—which may be as important as the result.

In the great cases argument may not too significantly affect the result. Ability of counsel is not likely to determine whether racially separate schools are constitutional. But in the less important cases ability of counsel just as clearly can make the difference, as it can in any court.

And though oral argument of a case may take just an hour or two, those hours come at a significant time. On Friday of each argument week, at their regular conference, the justices cast tentative votes on the cases heard that week. Rarely will they have had much time to study the briefs since the argument. Thus the oral presentation will be what is freshest in their minds when they decide.

Arguments take up most of the Court's public hours. There is also, almost every day in session, admission of new members to the Supreme Court bar, a friendly but somewhat tedious ceremony that nets the Court $25 per lawyer. (The money is used to cover expenses of indigent parties before the court.) Admission to the Supreme Court bar requires only that the lawyer has been a member of the bar of his state's highest court for three years.

Then, on occasional Mondays, opinions come down. And even here the obvious drama of the result is enhanced by personalities and sidelights.

The very manner of delivering opinions is an issue. The Supreme Court has stuck to the tradition of oral delivery, although printed copies are handed to the press as the justice begins speaking. But there are sharp differences of enthusiasm about the oral tradition. Some justices read opinions verbatim. Others summarize. Others give little more than the result.

Justice Frankfurter, the foremost advocate of the tradition, objected vocally last term when Justice Black contented himself with a statement of the result in a major case. Justice Frankfurter recalled that Jefferson wanted to make every member of the Court state his opinion on every case.

A few minutes later, as he read a dissent which was the fourth opinion on the same case, Justice John Marshall Harlan said drily: "We have almost reached Jefferson's ideal."

Another day Justice Frankfurter, as is his custom, expounded a majority opinion of his without referring to the text. Chief Justice Warren prefaced his reading of a dissent with the biting remark to the audience that the written majority opinion was somewhat different from what had just been said and that the dissent had been prepared to answer the written version.

But such evidences of intra-Court strain, reflecting deep intellectual differences sharpened by continuous close association, are relatively rare. On the whole the scene in the Supreme Court discloses a lively but orderly and effective process for examining and disposing of some of the great issues in American life. ♦

Gordon Levoy, who has distinguished himself for his legal ability, is one of the best known lawyers in California. He is also a master of the English language. "It is an important fact to remember," Levoy says, "that every case has two sides, and that the first function of the lawyer is the possession of legal knowledge and the ability to interpret and convey his thoughts and meanings to others through the right use of words. The spoken and written words are the raw materials of the lawyer's profession, and he must seek to express his knowledge and wisdom with skill and precision through the medium of language. This is acquired by study and practice. The lawyer must always live in an atmosphere of learning and keep his mind constantly refreshed and renewed by contact with the great legal thinkers of the past, leading cases of the law, historic judgments and opinions. Only with such resources at hand can he attain to true understanding and application of the law."

IGNORANCE OF THE LAW IS NO EXCUSE

by Bergen Evans

THE COMMON MAN'S REMEDY for all social ills is to pass a law against them. "There ought to be a law" is the infallible formula of disapproval; and judges, legislators, and the Executive labor mightily, in edicts, injunctions, proscriptions, directives, statutes, ordinances, acts, rules, and regulations, to meet the popular demand—though sin and crime, often with assistance from some of the same legislators, seem to flourish as vigorously as ever.

This is explained, in the vulgar conception, by the existence of a parcel of rogues known as lawyers, a parasitic tribe that in some inexplicable way has managed to interpose itself between the ordering and administering of justice, where it deliberately obscures plain intent and creates, to its own profit, interminable delay. The common man has no terms of opprobrium strong enough to describe the knavish members of this group. They are greedy rascals who refute good words with gibberish, draw unwarranted deductions from "circumstantial evidence," prefer precedent to justice, and reverse sensible decisions merely because a word is misspelled or a comma out of place.

A plurality of accusations, however, like a plurality of excuses, often conceals the real meaning, and one suspects that the actual sin of the lawyer and the true basis of the popular aversion to him is that he is an intellectual. He is interested in classifications and categories and logic. He has had—however brief and blurred—

a glimpse of the concept of justice. He is a champion of civilization against barbarism in that he seeks to have men live by reason, order, and custom, and, almost alone in our society, understands what is meant by the common weal.

Delay is one of the chief charges that the layman constantly brings against the lawyer. "The law's delay" is listed by Hamlet, in his famous soliloquy, as one of the major burdens of existence. But it may be questioned whether delay is inherent in the law or even in the predilections of lawyers. The structure of society must bear some of the blame, and the structure of a democratic society must bear a great deal of the blame. The demand that cops and judges "get tough" with criminals, for instance, which one frequently hears from solid citizens (except when the citizens happen to get arrested themselves), is not likely to be gratified so long as we seek to defend the liberties of the individual.

The law's delays may be a burden to the plaintiff, but most defendants welcome them, and when any group or class consists of those who will normally be defendants in litigation, that group or class will do what it can to make litigation a protracted and expensive business. The landed gentry were such a class, and the incredibly protracted legislation of the nineteenth century was the result. Corporations are in the same position today. It has been estimated that "the chances that a corporation will be a defendant rather than a plaintiff in litigation are probably at least 100 to 1," and that, in consequence, corporation lawyers would probably "render the machinery of justice completely impotent" were it not that their clients also, occasionally, have to appear as plaintiffs.

Legal phraseology is usually infuriating to the common man, who doesn't see why "a plain fact shouldn't be plainly stated"—though the same common man will hear commercials refer to a product as "superior" or "better" without demanding to know "superior to *what?*" or "better than *what?*"

Half the civil suits that come before our courts grow out of the obscurity of "plain" language. The wording of legal documents may be tedious, polysyllabic, repetitious, cacophonic, and humorless, but to anyone not panic-stricken at the sound of "whereas," it usually makes the meaning clearer than it otherwise would be. "The party of the second part" may be cumbrous, and it may be exasperating to have to pay a lawyer to write it, but "him" will eventually fatten a dozen lawyers.

None the less, to the aggrieved litigant legal terminology remains studied pedantry, a part and parcel of the mentality that delights in quibbling and finds a typographical error sufficient reason for reversing a decision.

Serious grounds may, of course, seem trivial to the untrained or prejudiced mind, and the papers, in presenting an account of any reversal, "play up" the popular delusion if they can. Thus even the *New York Times* in its report of the dismissal of a first-degree manslaughter indictment against James Harrison, by Judge Samuel S. Leibowitz, in 1948, shaped the whole story to emphasize the fact that it was the "omission of a question mark in a stenographic report of an alleged statement" made by Harrison, after his arrest for the fatal stabbing of his wife, that led to Judge Leibowitz's action. This is exactly the sort of thing that the indignant layman expects, and the headlines must have caused many a snort and exclamation of disgust.

But the full story made it plain that the question mark was by no means a trifle. In the stenographic record Harrison was made to say: "I had intentions of stabbing her—," a clear admission of that premeditation which can make all the difference between life and death for the accused. Whereas, it seems, he had actually exclaimed in horror, rejecting a suggestion of premeditation in a rhetorical question: "I had intentions of stabbing her?" So that the question mark was not a mere flourish of punctuation, but something which made the distinction between a confession and a denial.

The weight that precedent carries with judges is often another source of annoyance to the layman—unless, of course, the precedent happens to be in his favor. Even when the worst case possible is made out against appeal to precedent, however, it remains the lesser of two evils and, despite its limitations, is one of the cornerstones of justice. Law is what the courts will say it is, and men risk their fortunes every day on the assumption that the courts will be consistent. Appeal to precedent may sometimes perpetuate injustice; but a disregard of precedent would produce chaos and destroy all justice.

The popular mistrust of "circumstantial" evidence is basically anti-intellectual, a hatred of logic and a dislike of trained experts, though usually disguised as a desire for "proof" or even "fair play." Evidence may be direct or circumstantial. Evidence is direct when sworn to by persons having actual knowledge of the facts in issue—the witness actually saw the crime committed or saw the accident. Circumstantial evidence is evidence upon facts other than those directly in issue in the trial, but from which, by human experience, the facts in issue may be inferred and thereby proved. Both can be misleading, but no one who has had much experience with human testimony would hesitate to accept circumstantial evidence.

If an automobile, for example, had been wrecked in such a way that it would have been impossible to move it before the police got there, and if the police show photographs that include eighty-foot skidmarks on a level pavement leading directly to the wrecked car, few opponents of circumstantial evidence would accept the assurance of the driver that he was going only twenty miles an hour.

There are many fallacies concerning the practical application of particular laws to everyday affairs—such beliefs as that a man is obliged to save a life if he can, that it is illegal to change one's name without permission of a court, that "the greater the truth, the greater the libel," and that a prefatory "it is alleged" automatically frees a speaker or writer from any liability for the ensuing utterance.

Though all humane and moral feelings cry out against it, a man is not *legally* obligated to save a life just because it may lie in his power to do so. The detached and contemplative citizen is at perfect liberty to watch a fellow citizen drown or get run over or eat a poisoned lollipop without offering so much as a warning. Humanitarians may condemn, but the law is reluctant to countenance nonfeasance as a basis of liability. Indeed, it could scarcely be otherwise; for how could the perception of the danger and the ability to prevent it be established—established so incontrovertibly, that is, as to sustain the serious charge of murder or manslaughter which would have to be made?

There are those, however—such as policemen on duty, parents at all times, and lifeguards during their working hours—who have "a legal duty to act," and can be held responsible for not acting. Furthermore, their liability is automatically assumed by anyone who, by some act of his own, renders it impossible for them to perform their duty. Thus a cautious bather on the beach has no legal obligation to assist an incautious bather in the water. But if the bather on the beach should, in a spasm of zeal, seize the lifeguard's boat and set out to rescue the incautious bather, thus depriving the lifeguard of his power to act, he has assumed responsibility; and if he should lose his nerve and turn back, or allow himself to be diverted by some more attractive bather than the one he set out to assist, he may be held for the consequences.

Doctors, in particular, are victims of the popular belief that one is required to save a life. Newspaper stories of those who have died

"because medical aid has been refused them" are sure-fire indignation-breeders. Most of the cases, when examined, turn out to be not quite what was suggested in the headline: the aid was not sought in time or in the proper way or at the proper place; the doctor was occupied with other patients who had prior claims; or the patient, or his relatives, attached some exasperating or inacceptable condition to the demand for attention. Something of this sort almost always lies at the bottom of these stories; few physicians would refuse to help in a desperate emergency.

But even if one or two did, they have violated no statute. A doctor is under no more legal obligation to exercise his skill than is any other citizen. That many people think he is, and that there is widespread resentment when he refuses, is a tribute to the high standard that the doctors themselves have voluntarily maintained, but it has nothing to do with the law.

Those who believe that a man cannot change his name without permission of a court are not wholly wrong, for some states do have statutes that so rule. But most agree with Illinois that a man's name is that by which he is known, and that he may change it at will if he does not do so with intent to defraud.

Lord Mansfield's aphorism that "the greater the truth, the greater the libel" is still heard, but it no longer pertains in the United States. In every state except New Hampshire truth, in civil libel, is a complete defense, provided that "it is published with good motives and for justifiable ends." That is, you can't just go around disseminating some shameful thing about a man (such as his having been in the penitentiary), even if it is true, unless you can show that you had some good reason for publishing the fact. Politicians, by the way, are underprivileged in the matter of libel; courts have held that a certain amount of sneering and ridicule must be accepted as the politician's lot.

Perhaps the popular conception of libel is colored by the fortuitous sound of "lie" in the first syllable. *Libel* does not mean an untruth, but a little book. That was its original meaning. Then it came to mean a paper and then any publication. The essence of libelousness lies in its defamation, which, in turn, may depend on its intent. A Louisiana doctor collected damages for having been *praised* in the *New Orleans Picayune*, alleging that the particular praise (of an operation he had performed) constituted advertising and that advertising damaged his professional standing.

The dangerous belief that responsibility for a defamatory utterance is avoided if the utterance is attributed to someone else—by being "alleged" or enclosed in quotation marks—is based, apparently, on a misunderstanding of what is meant in the law by "publishing" a libel. It does not mean the invention of, or even an acceptance of responsibility for, but the mere making public of, the defamatory statement. Reading such a statement aloud, or even stating it in a will, has been held to constitute "publishing" a libel. It doesn't require a large audience; "one or more persons capable of understanding" the defamatory remark will do. Even though you don't believe the defamation and make that fact clear in the very act of repeating it, you have not freed yourself from the tort of publishing it.

Similarly, such assurances as "any resemblance to persons living or dead is purely coincidental" offer no protection against libel suits. If a resemblance can be shown, and if it can be shown to be defamatory, it is immaterial that the author or producer did not so intend it. It is immaterial, indeed, that they did not even know of the resemblance. The question "is not so much who was aimed at as who was hit." The assurance of no such intention is irrelevant; you can't get out of a legal responsibility by exempting yourself from it.

In money matters there are a number of deep-rooted fallacies. For example, one meaning of the word *deposit* is the placing of something in trust or safekeeping, and the common use of this word to describe money placed in a savings account may in part explain the idea, so often and so vociferously expressed, that an insolvent bank has defrauded its depositors. But money deposited in a savings bank is simply a loan. It makes the bank a debtor, not a trustee, and does not, necessarily, give the depositor preference over other creditors.

The common man firmly believes that a written contract is more binding than a spoken contract, and he is right in so far as an oral agreement is more difficult to establish in court if one of the parties chooses to deny that he ever made it. But if there is sufficient credible testimony, a spoken agreement is as binding as a written one.

Even a written agreement, however, is not always binding. The law is no tyrant to compel a man, simply because he has signed on the dotted line, to permit himself to be defrauded. A mere promise, it might be pointed out, even though written and notarized, is not binding at all. It may be repudiated at will. Promises have to be kept only when a "consideration" has been received in exchange or where something has been promised in return. The value of the consideration, though, unless it has been fraudulently misrepresented, is no concern of the court's.

No man can sign away his legal rights. Thus, one who signs a waiver on entering a hospital can, under certain circumstances, still recover for negligence.

Many a base and cunning rascal has marked "paid in full" on a check that is made out for less than the sum owed, on the assumption that the creditor would rather have something than nothing, and that his acceptance of a check so marked will constitute a waiver of the remainder of the debt. And many a timid creditor has refused to accept such a check for fear that his endorsement might seem an acknowledgment of full payment.

Both hope and fear are unjustified. The notation "paid in full" is unilateral and has no binding force whatever. Even where a creditor has voluntarily given a receipt in full, he may collect more if he finds that there has been an omission in his bill.

There are many exciting stories of a misplaced decimal that bankrupted some great mail-order house, but they are largely fanciful, perhaps the fabrications of an astute publicity department. Few catalogues are now published that are not protected by some warning or reservation, and even if they were not, the firm that issued them could not be compelled to make good on a typographical error because, legally, listing in a catalogue is not an offer to sell; it is an invitation to consider merchandise that is for sale.

A recipient is under no obligation to pay for what he never ordered. But he is not entitled to use what he has not paid for. If he uses the goods sent to him, whether he ordered them or not, he can be compelled to pay for them. If the goods are not used, however, the recipient is under no obligation to pay for them or to return them. The sender must pick up his goods at his own expense.

Finders often *are* keepers, but they have no legal right to be. For example, the law of the state of New York provides that a person who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner and who appropriates the property to his own use without having made reasonable efforts to find the owner, is guilty of larceny. The New York City ordinance requires that the finder of lost property must either deposit the property with the legal authorities or at least report the finding to the legal authorities. Nevertheless, the finder of the property acquires a property right in the property against everyone but the true owner, though finding lost property in and of itself cannot result in the transfer of title to the property to the finder. Further scope for legal subtlety is offered by the question whether the object was lost or abandoned. ♦

OATH OF ADMISSION TO THE BAR

THE GENERAL PRINCIPLES *which control the lawyer in the practice of his profession are clearly set forth in the following sample Oath of Admission to the Bar, formulated upon that in use in various States, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in most States—duties which lawyers are sworn on admission to obey, and for the wilful violation of which disbarment is provided:*

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of . . . . ;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

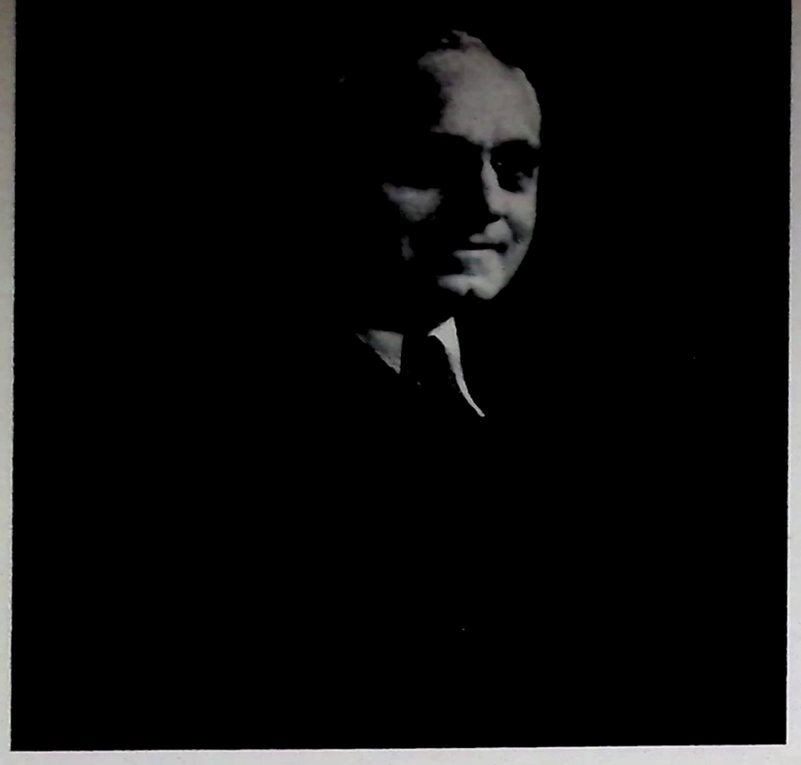
I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD. ♦

Felix Frankfurter was born in Vienna, Austria on November 15, 1882, and came to the United States as a boy of twelve. He obtained his B. A. at the College of the City of New York in 1902, and a year later entered Harvard Law School, from which he graduated in 1906.

Frankfurter began his distinguished career in 1906 as Assistant United States Attorney for he Southern District of New York, working under Henry L. Stimson. In 1911, when Stimson was appointed Secretary of War, Frankfurter became Law Officer of the Bureau of Insular Affairs, a position which he held until 1914 when he joined the faculty of Harvard Law School as a Professor of Administrative Law. During World War I he served as assistant to the Secretary of Labor and as chairman of the War Labor Policies Board.

In 1919 Frankfurter resumed his work at Harvard, remaining there until January 1939 when he was appointed Associate Justice of the United States Supreme Court. During his busy life Frankfurter has made a brilliant reputation as a teacher, scholar and Associate Justice, and has become known as an influential adviser to Presidents of the United States.



Justice Frankfurter by Karsh

from the Wisdom of FELIX FRANKFURTER

The dead should not cease to be in the minds of men. I feel this especially about men and women who have expended their lives on significant but unadvertised work, whether plowing the lonely furrow of scholarship, or foregoing the comforts of life for the drudgeries that accompanv achievement in undramatic phases of government, or pioneering in the dark areas of our industrial society. These people have given proof, in diverse ways, of the grace and gallantry of the human spirit.

Too often is it assumed that mere attainment of the Psalmist's years affords the Psalmist's justification for self-disclosure. The fact is that zestful as my years have been, I am not particularlv interested in looking back. The present sufficiently absorbs my interest and energy.

My life has been given to law—but not law as a critique of pure reason. For half a century I have been preoccupied with the study of law. For half of that time it was a scholar's study, subjected to the influences of fellow scholars and, particularly, the stimulus of questioning by critical young minds. The other half of my life in the law has been concerned with its concrete application in the context of a democratic society—law, that is, devoted to the protection of personal rights and the promotion of public ends.

It is important not to give the appearance of a predisposed mind. And it is more important not to let the mind become predisposed.

It may be that responsibility for decision dulls the capacity of discernment. The fact is that one sometimes envies the certitude of outsiders regarding the compulsions to be drawn from vague and admonitory constitutional provisions. Only for those who have not the responsibility of decision can it be easy to decide the grave and complex problems they raise, especially in controversies that excite public interest. This is so because they too often present legal issues inextricably and deeply bound up in emotional reactions to sharply conflicting economic, social, and political views. It is not the duty of judges to express their personal attitudes on such issues, deep as their individual convictions may be. The opposite is the truth; it is their duty not to act on personal views.

What becomes decisive to a justice's functioning on the Court in the large area within which his individuality moves is his general attitude toward law, the habits of mind that he has formed or is capable of unforming, his capacity for detachment, his temperament or training for putting his passion behind his judgment instead of in front of him.

Lawyers vary greatly in the adjustment that has to be made in going from public work to private practice. Even those who came to public office from long private practice find the return to it difficult. This has been true of some of the ablest lawyers.

It is, I believe, not inaccurate to say that most of the occasions when the Supreme Court has come into virulent conflict with public opinion were those in which the Court disregarded its settled tradition against needlessly pronouncing on constitutional issues.

Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.

Truth notoriously has a hard time of it. Ancient wisdom admonishes against speaking ill of the dead, and our Puritan tradition constrains us from offending the modesty of the living.

Loose judicial reading makes for loose legislative writing. It encourages the practice illustrated in a recent cartoon in which a senator tells his colleagues: "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means."

What matters most is whether the standards of reason and fair dealing are bred in the bones of people.

If what I have brought you, in my endeavor to give you as frankly as I may the distillation of years of reflection from within the tribunal peculiarly concerned with government under law, is charged with being an old-fashioned liberal's view of government and law, I plead guilty. For the charge implies allegiance to the humane and gradualist tradition in dealing with refractory social and political problems, recognizing them to be fractious because of their complexity and not amenable to quick and propitious solutions without resort to methods which deny law as the instrument and offspring of reason.

Believing it still important to do so, I have tried to dispel the age-old illusion that the conflicts to which the energy and ambition and imagination of the restless human spirit give rise can be subdued, even if not settled, by giving the endeavors of reason we call law a mechanical or automatic or enduring configuration. Law cannot be confined within any such mold because life cannot be so confined. Man's most piercing discernment of the future cannot see very far beyond his day, even when guided by the prophet's insight and the compassionate humility of a Lincoln. And I am the last to claim that judges are apt to be endowed with these gifts.

In exercising their technical jurisdiction, courts thus release contagious consequences. Nothing is farther from my mind than to suggest that judges should exceed the professional demands of a particular decision. If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place. Self-willed judges are the least defensible offenders against government under law. But since the grounds of decisions and their general direction suffuse the public mind and the operations of government, judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constricting or promoting the force of law throughout government. Upon no functionaries is there a greater duty to promote law.

Broadly speaking, the chief reliance of law in a democracy is the habit of popular respect for law. Especially true is it that law as promulgated by the Supreme Court ultimately depends upon confidence of the people in the Supreme Court as an institution. Indispensable, therefore, for the country's welfare is an appreciation of what the nature of the enterprise is in which that Court is engaged—an understanding of what the task is that has been committed to the succession of nine men.

Those who know tell me that the most illuminating light on painting has been furnished by painters, and that the deepest revelations on the writing of poetry have come from poets. It is not so with the business of judging. The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition or because they are inhibited from practicing it. The fact is that pitifully little of significance has been contributed by judges regarding the nature of their endeavor, and, I might add, that which is written by those who are not judges is too often a confident caricature rather than a seer's vision of the judicial process of the Supreme Court.

A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense of internal contradiction.

Without a free press there can be no free society. That is axiomatic. However, freedom of the press is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional guarantee of the freedom of the press are to be viewed and applied in that light.

Believe it or not, there is ambition even in the breasts of men who sit on the Supreme Court of the United States.

Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it at least in part, may burst forth with an intensity that exacts more than reasonable satisfaction. Law as the response to these needs is not merely a system of logical deduction, though considerations of logic are far from irrelevant. Law presupposes sociological wisdom as well as logical unfolding. The nature of the interplay of the two has been admirably conveyed, if I may say so, by Professor Alfred North Whitehead:

"It is the first step in sociological wisdom, to recognize that the major advances in civilization are processes which all but wreck the societies in which they occur:—like unto an arrow in the hand of a child. The art of free society consists first in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows."

A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone quantitative, proof.

Judges are men, not disembodied spirits. Of course a judge is not free from preferences or, if you will, biases. But he may deprive a bias of its meretricious authority by stripping it of the uncritical assumption that it is founded on compelling reason or the coercive power of a syllogism. He will be alert to detect that though a conclusion has a logical form it in fact represents a choice of competing considerations of policy, one of which for the time has won the day.

I, myself, think that the bench—we lawyers who become judges—are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I do not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training gives you any special competence. I, myself, hope that one of these days, and before long, we will divide the functions of criminal justice. I think the lawyers are the people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery—the rules of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent—I think lawyers are peculiarly fitted for that task. But all the questions that follow upon ascertainment of guilt, I think, require very different and much more diversified talents than the lawyers and judges are normally likely to possess.

For judges, it is not merely a desirable capacity "to emancipate their purposes" from their private desires; it is their duty. It is a cynical belief in too many quarters, though I believe this cult of cynicism is receding, that it is at best a self-delusion for judges to profess to pursue disinterestedness. It is asked with sophomoric brightness, does a man cease to be himself when he becomes a Justice? Does he change his character by putting on a gown? No, he does not change his character. He brings his whole experience, his training, his outlook, his social, intellectual, and moral environment with him when he takes a seat on the supreme bench. But a judge worth his salt is in the grip of his function. The intellectual habits of self-discipline which govern his mind are as much a part of him as the influence of the interest he may have represented at the bar, often much more so.

Need it be stated that true humility and its offspring, disinterestedness, are more indispensable for the work of the Supreme Court than for a judge's function on any other bench? These qualities alone will not assure another indispensable requisite. This is the capacity for self-searching. What Jacques Maritain said in another connection applies peculiarly to members of the Supreme Court. A Justice of that Court cannot adequately discharge his function "without passing through the door of the knowing, obscure as it may be, of his own subjective."

Evidence and truth are of no avail unless they can be adequately presented.

No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do.

In a recent discussion of two books on the conflict between the claims of literary individualism and dogma, I came across this profound observation: "But when, in any field of human observation, two truths appear in conflict it is wiser to assume that neither is exclusive, and that their contradiction, though it may be hard to bear, is part of the mystery of things." But judges cannot leave such contradiction between two conflicting "truths" as "part of the mystery of things." They have to adjudicate. If the conflict cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstandings about the judicial process. This, for any conscientious judge, is the agony of his duty.

Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I suspect the answers to the problems of an art are in its exercise. Not that one does not inherit, if one is capable of receiving it, the wisdom of the wise. But I confess unashamedly that I do not get much nourishment from books on statutory construction, and I say this after freshly re-examining them all, scores of them.

When one wants to understand or at least get the feeling of great painting, one does not go to books on the art of painting. One goes to the great masters. And so I have gone to great masters to get a sense of their practice of the art of interpretation. However, the art of painting and the art of interpretation are very different arts. Law, Holmes told us, becomes civilized to the extent that it is self-conscious of what it is doing. And so the avowals of great judges regarding their process of interpretation and the considerations that enter into it are of vital importance, though that ultimate something called the judgment upon the avowed factors escapes formulation and often, I suspect, even awareness.

A judge of marked individuality stamps his individuality on what he writes, no matter what the subject.

Judges are not unfettered glossators. They are under a special duty not to overemphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.

Like others, judges too listen with what psychologists used to call the apperception mass, which I take it means in plain English that one listens with what is already in one's head. One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.

Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency. They come from the legislative mint with some intrinsic meaning. Sometimes it remains unchanged. Like currency, words sometimes appreciate or depreciate in value.

The best of the legal profession is no longer content to repeat the formula of intellectual abdication attributed to a great medieval judge that the Devil himself knoweth not the mind of men, nor is it content to leave illumination of the dark recesses of a criminal's being to a rare great artist—a Shakespeare or a Dostoevski. To be sure, the secrets of personality can no more be unlocked by the mere accumulation of observed facts than can those of nature. Without the exercise of imagination no new insights can be gained. But the imaginative insight of a Shakespeare is no substitute for the systematic, scientific pursuits of a Freud.

Justice Felix Frankfurter and his wife, Marion, at home.

Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society.

The function of statesmanship is to endeavor to forestall untoward events or to prepare adequately against them.

For the most part I think we can trust twelve people on a jury at least as well as judges as to motives, for judges are rather removed from every-day actualities and on the whole are bound to be so by their calling.

For man is omnipotent. There is no goal he can imagine in the realm of mind which he cannot reach sooner or later in the realm of matter. There is no force yet discovered which is strong enough to foil him: through his children he can overcome even the apparent finality of death. There is no fear so potent that it will forever deter him, nor any suffering so great that he cannot endure it for his spirit's sake. In him is every quality that he attributes to his gods: beauty, wisdom, omniscience, omnipotence, divinity.

Moral courage is the rarest ingredient of character.

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.

In too many States our judges have very limited control over the jury. They cannot instruct them or guide them on the facts. They are really umpires at a fight. Also you must remember that in most States the judges—the State court judges—are elected. There is less than a handful of States in which judges have a life tenure and the effect of that on the administration of justice is often far-reaching.

No one can be a truly competent lawyer unless he is a cultivated man. The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe.

The excellence of a biography is hardly to be measured by the extent to which it echoes a reader's opinion. A biography is to be judged by the insight it gives into the complexities of character, not by the satisfaction it affords the reader's presuppositions.

A member of the Supreme Court is at once a soloist and part of an orchestra. While dissenting opinions seem like solo performances, even that is not always true, and, in any event, the private rehearsals, as it were, behind the impenetrable draperies of judicial secrecy may tell much more about the soloist and the rest of the orchestra than the public performance even remotely reveals.

Judges like other people have their inborn qualities, deflected and disciplined, enriched or narrowed, by their education, their reading, their experience, their associations, their depth and drive of creative reflection, their capacity for rigorous, undeceiving self-analysis.

Judges are seldom men of great literary talent and not always are they copious letter writers yielding self-revelation--self-revelation that is either the product of a Socratic kind of self-knowledge or the unintended self-revelation which gives a picture of oneself as one would like to appear to oneself as well as to others.

The great art of judicial biography requires deep understanding of the judicial process, delicate analysis of character, and the creative humility of the artist.

The one judicial figure whom even the least informed knows of in the history of the United States is the great Chief Justice John Marshall. It is an interesting fact that although, for essential purposes, the history of our constitutional law almost begins with him, and the significant history of the Supreme Court of the United States begins with him, he was the fourth chief justice. His three predecessors all had very short tenure.

The first was a great man, John Jay. It is not without significance in attempting to understand the then position of the chief justice of the United States, that John Jay resigned the chief justiceship to become governor of New York—not that I underrate the importance of the governorship of New York, either then or now. But it is certainly true that since Marshall's time only a madman would resign the chief justiceship to become governor.

Jay's successor, John Rutledge of South Carolina, had the singular distinction of serving only a few months as chief justice by interim appointment. He was rejected by the Senate of the United States, and therefore was not able to continue to occupy the post.

The third chief justice was another eminent man in our history, Oliver Ellsworth, who was the architect of the act that created the federal judicial system. His structure remained, for all practical purposes, unaltered from 1789 to 1869. He was chief justice for only four years. Ill health put an end to his service.

Then came John Marshall. I should say the three greatest chief justices we've had were John Marshall, Roger Taney, and Charles E. Hughes. It is an interesting fact that the first two of these, between them and in immediate succession, served for almost one-half of the 164 years the Court has been in existence. Marshall from 1801 to 1835, and Taney from 1836 to 1864. I emphasize the duration of their service because the length of time during which a chief justice presides over the Court has, of course, a great deal to do with his place in history. Time is one of the most important factors in the realization of a man's potentialities.

The chances of realizing a specific ambition, the laws of chance, are so much against you that, if I may say so, I do not think any of you should harbor an ambition to become chief justice of the United States. The likelihood that you will realize it—I do not know what mathematicians would say—is worth nothing, and the likelihood that you will have an embittered life is very considerable. The thing to do is to have ambition in a certain direction but not to fix it on a point of arrival, an ambition going to general purpose in life and not to the particular form in which that purpose is to be realized.

An important thing in the work of a chief justice which distinguishes him from other members of the Court is that he is the presiding officer, and has guidance of the business of the Court in his charge. It is not what he says in his opinions that is more important than what his brethren say, but what he advises on the mechanics of doing the job—should we give a lawyer extra time, should we hear this case now or later, should we grant a rehearing if the Court is divided? These are things that pertain to the way that the business should be done, things that cannot properly be managed without knowledge of the nature of the business, or, since you deal with eight other human beings, without knowledge of the ways of the other justices.

from the Wisdom of FELIX FRANKFURTER . . .

Volume is the least significant aspect of scholarly work. Too often it is the enemy of scholarship.

When men get short of temper, humor is a great solvent.

Excellence in the learned professions usually begins at the end of a long and toilsome journey.

All of us, even those who are not attached to any formal religion, have need of that which silent prayer satisfies. It is the need of gathering together one's inner resources.

Why should anyone expect nine men, presumably there because of their special capabilities, all to have the same thoughts and views? One would suppose that nine men are put there because you want variety of thought. No one expects such harmony and identity of views among physicists, let alone among professors of sociology or history. Why should they expect nine people to know how to apply in unison and in concord such delightfully vague phrases or concepts as "due process of law," phrases, as a great judge once said, of "calculated ambiguity"?

Just as the newspapers do not print, "Mr. and Mrs. Jones have been happily married for fifteen years this day," but would print somewhere in the paper that Mr. and Mrs. Jones are getting a divorce, just so newspapers do not often publicize the cases in which the Court is unanimous. I can assure you that there are a great many such—most of them, in fact. What captures the headlines are the divisions: "The Supreme Court divides on minimum wages. The Supreme Court divides on child labor. The Supreme Court divides on this and that."

What judge would be worth his salt if it made any difference to him that the President who appointed him, whether he was on or off the Court, disagreed with him? What judge worth his salt would have his convictions influenced by whether the chief justice is a charming man and a delightful raconteur, or not? That isn't the nature of the enterprise.

One of the things that laymen, even lawyers, do not always understand is indicated by the question you hear so often: "Does a man become any different when he puts on a gown?" I say, "If he is any good, he does."

A chief justice has no authority that any other member of the Court has not. That really is an institution in which every man is his own sovereign. The chief justice is *primus inter pares*. Somebody has to preside at a sitting of nine people, and he presides in court and at conference.

The greatest intellect, in my judgment, who ever sat on the Court was Mr. Justice Holmes.

I don't like a man to be too efficient. He's likely to be not human enough.

The founders of the republic knew, as did Pericles, that if the secret of happiness was freedom "the secret of freedom was a brave heart."

It is true of opinions as of other compositions that those who are steeped in them, whose ears are sensitive to literary nuances, whose antennae record subtle silences, can gather from their contents meaning beyond the words.

No citizen exercises a more important function in a democracy than does a poet, for the poet is concerned with the abiding issues of life. The poet, beyond anyone, must rescue us from the dominance of the moment. Poets thus shape public events by shaping the movement of ideas—the thoughts and aspirations of men which are the cause and not the effect of public events. In the deepest sense it is true that poets are the real legislators of the world. What determines action is not facts, but the feelings of worth aroused by them. These feelings are aroused not by abstract logic but by imagination. Imagination is the poet's instrument.

It is as true now as it was in the days of Euripides that the worldly wise are not wise.

There is only one way in which a poet can keep silent when his feelings are stirred: by silencing forever the poet in him.

Advocates, too, sometimes lose their tempers, or, in the heat of argument, say things they should not.

You cannot tell the quality or the importance of a man on the Supreme Court solely from his opinions.

Some cases are more interesting than others, and it is the prerogative of the chief justice not only to be kindly and fair and generous in the distribution of cases, but also to appear to be so. The task calls for qualities of tact, understanding, and skill in the effective utilization of the particular qualities that are available. Should one man become a specialist in a subject? Or is it important not to place too much reliance on one man because he's a great authority in the field? Should you pick the man who will write the opinion in the narrowest possible way? Or should you take the chance of putting a few seeds in the earth for future flowering? Those are all very difficult, delicate, and responsible questions.

I hope I have indicated enough to disclose that in view of the functions of the Supreme Court what you want in a justice is not a specialist in this or that field, not necessarily a man who has had prior experience on the bench, not necessarily a man who has been broadened by high office, as was the case with Hughes, rather than broadened by the depth and range of his reading and his thinking, as in the case of Mr. Justice Holmes.

What is essential for the discharge of functions that are almost too much, I think, for any nine mortal men, but have to be discharged by nine fallible creatures, is that you get men who bring to their task, first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them, disinterestedness, and allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law.

It is often said of a contemporary figure destined for historical survival that it is too early to pass judgment on his work. The assumption is that the future will pass a definitive judgment. But there never is a definitive appraisal. Each generation places its own valuations; reputations grow and recede, only to grow again and recede. Even majestic figures—Shakespeare and Washington—have fluctuating recognition. No doubt the future attenuates merely personal bias, but it gives no assurance of freedom from partisanship. In any event, contemporary judgment may contribute the impact of vividness and immediacy, which only the most imaginative artist can later create. The limitations of contemporary judgment derive not so much from its closeness to the subject; they are due to the fragmentary materials on which judgment is based.

Dignity makes for an atmosphere of respect, and only in such an atmosphere can reason thrive. And without reason, law is merely a screen of words expressing will in the service of desire.

The true face even of a public man is his private face. That can be seen only off stage, in the manner in which he pursues his tasks, day by day, when only those in close association see and hear and feel what he is doing.

A dominant figure is bound to be controversial.

Every biography reflects a viewpoint. The account and appraisal of another man's life are distilled in the alembic of the biographer's judgment. But it makes all the difference in the world whether the judgment is romantic, whether it imposes a preconceived view or passionate feeling upon objectively ascertainable materials, or whether judgment derives from those materials.

The nine men on the Court are coequals. Each in his work is a law unto himself, except for an overriding sense that he is the trustee of the most important traditions in our national system. The test of leadership in such a body is intrinsic authority.

The legal system of every living society, even when embodied in a written constitution, must itself be alive. Such a constitution does not merely enshrine the past. It is designed to give full scope to the future. Of all the forms of a national community, a federal system is the most complicated. It demands the greatest flexibility and imagination to harmonize national and local interests. The Constitution of the United States is thus not a historic parchment in a glass case. It is a continuous process of delicate governmental adjustments. And its judicial application is not a mechanical exercise, but a profound task of statecraft exercised by judges set apart from the turbulence of politics.

One may be preoccupied with law professionally in five different ways, as teacher, practitioner, administrator, judge, and philosopher. No one can pursue all these callings at the same time and the name does not readily occur of anyone who has done so in due succession if philosophy of law implies dwelling on the high plateau of original thought worthy of the company of thinkers like Holmes.

The essence of teaching is joint adventure in understanding.

As is true in every calling, men vary greatly in the temperaments they bring to judging. Some decide without great inner turmoil and others suffer anguish in the process. Some are serene once the inner debate is concluded; with some the throes of conflict linger long and are easily revived. Some are painfully slow workers, trace and retrace their steps; others swiftly strike at the jugular of a case and are done.

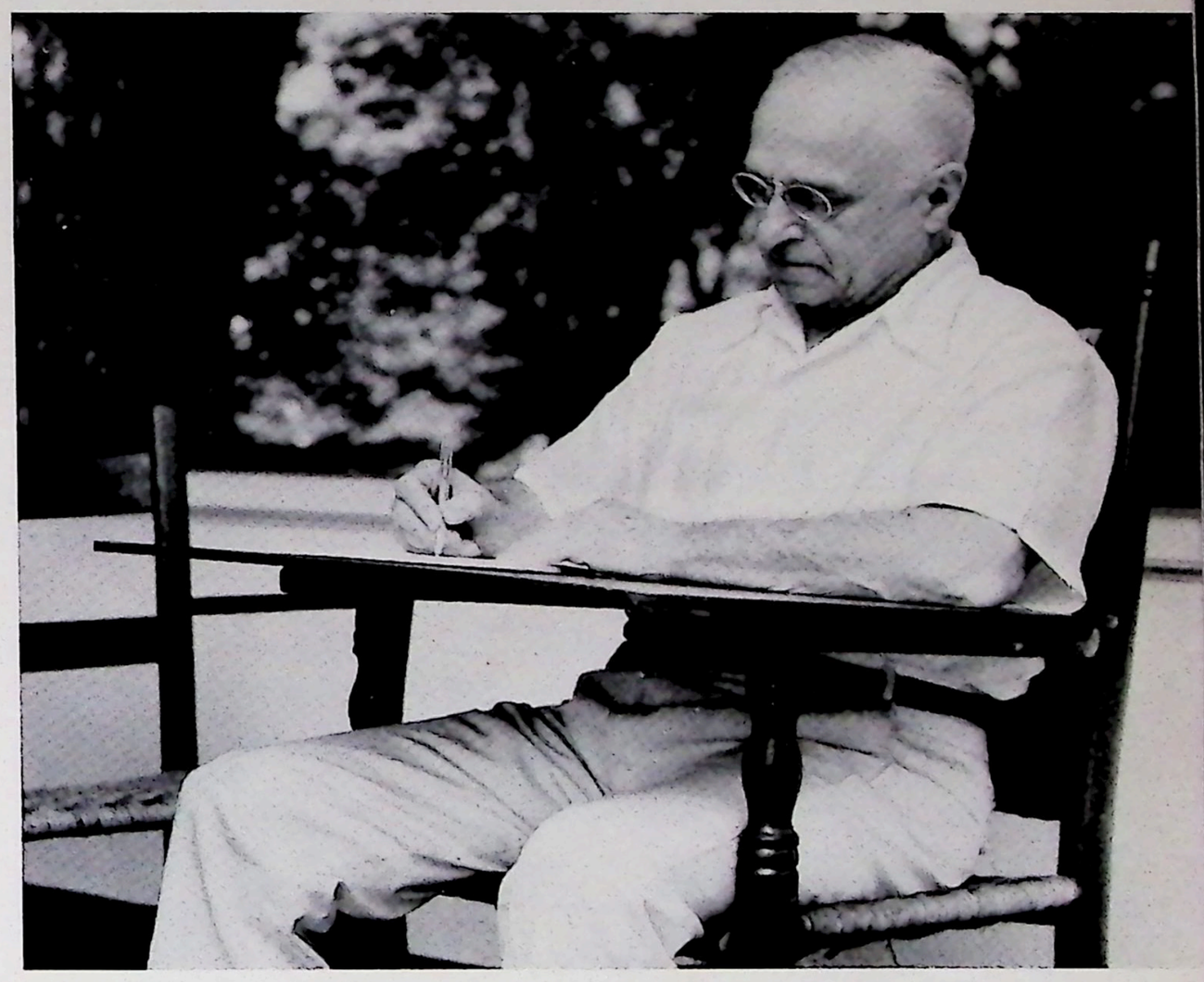
A man's achievements are to be measured by subtracting from what now exists that which he has added to what preceded him.

The duty of justices is not to express their personal will and wisdom. Their undertaking is to try to triumph over the bent of their own preferences and to transcend, through habituated exercise of the imagination, the limits of their direct experience.

Aim at excellence is often a paralyzing evasion of effort.

I think the style often reflects the writer's notion of the form in which an opinion should be cast or his desire to promote one purpose rather than another. A literary genius like Holmes no doubt writes the way he must. But there have been men on the Court whose conception of the required austerity of a Supreme Court opinion rigorously held in check an otherwise lively pen. Again, it makes a difference whether an opinion writer consciously aims to be understood by the casual newspaper reader, or whether he has a strong sense of the educational function of an opinion within the profession, and more particularly among law teachers, or writes merely to dispose of the case.

The function of an advocate is not to enlarge the intellectual horizon. His task is to seduce, to seize the mind for a predetermined end, not to explore paths to truths.



Some cases are born great and a judge shares the great occasion. Other cases achieve distinction through the creative power of the judge, especially when insight is conveyed with felicity.

Courage is especially shining when exercised by a markedly gentle nature.

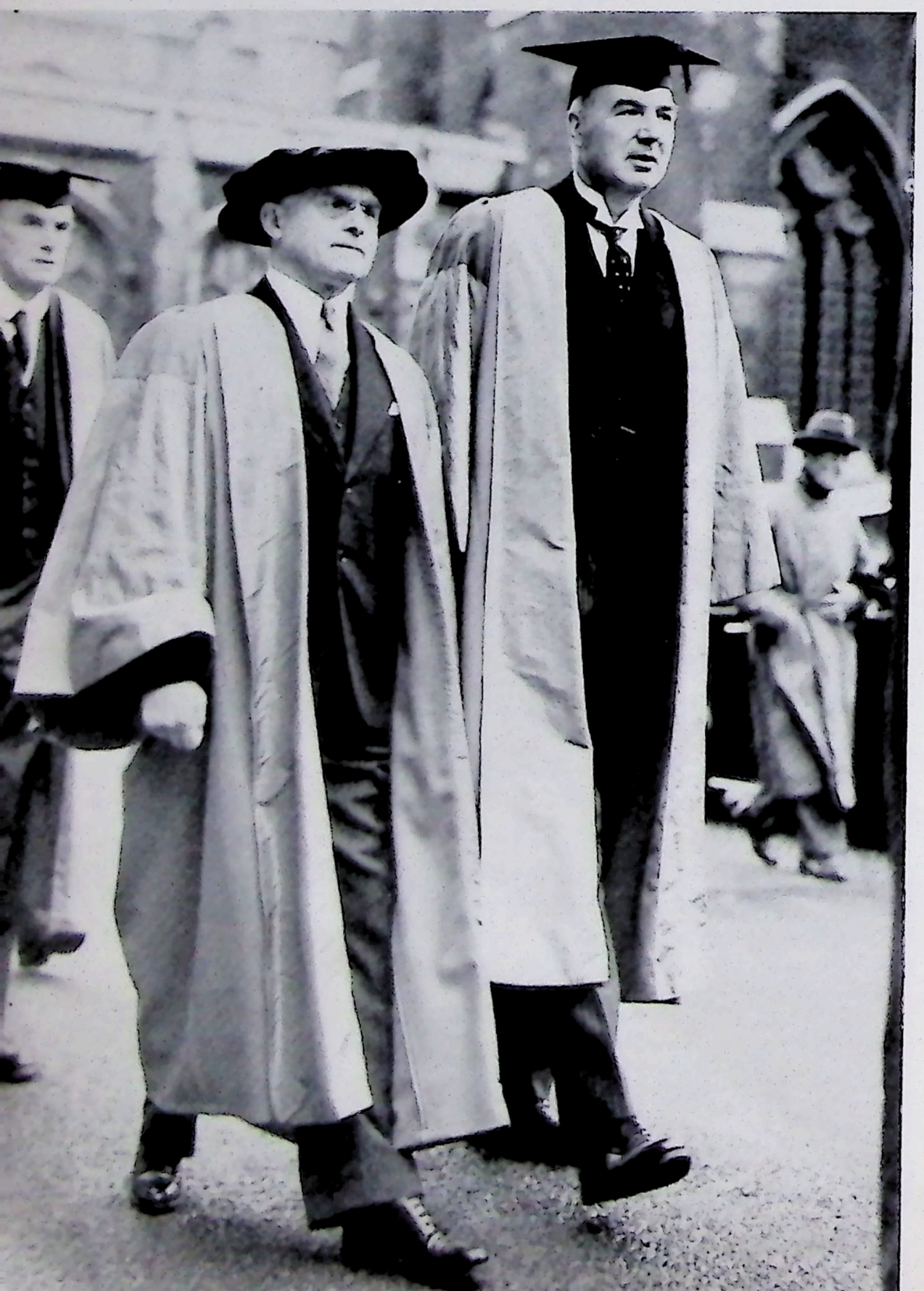
The dictum that history cannot be written without documents is less than a half-truth if it implies that it can be written from them. Especially is this so in making an assessment of individual contributions to the collective results of the work of an institution like the Supreme Court, whose labors, by the very nature of its functions, are done behind closed doors and, on the whole, without leaving to history the documentation leading up to what is ultimately recorded in the United States Reports. To be sure, the opinions of the different justices tell things about them—about some, more; about some, less. As is true of all literary compositions, to a critic saturated in them, qualities of the writer emerge from the writing. However, even in the case of an opinion by a justice with the most distinctive style, what is said and what is left unsaid present to students of the Court a fascinating challenge of untangling individual influences in a collective judgment.

from the Wisdom of FELIX FRANKFURTER . . .

The search for truth at a given time may require even of a judge avowed agnosticism or inexplicitness of statement. I believe it was Artemus Ward who said "it is better not to know so many things than to know so many things that ain't so."

The law no doubt is "the calling of thinkers." But it is necessary to add that "the good judge is an artist, perhaps most like a *chef*. Into the composition of his dishes he adds so much of this or that element as will blend the whole into a compound, delectable or at any rate tolerable to the palates of his guests." Like a good chef he makes the best dish when he uses the best materials. At any rate he avoids stale and underripe materials, and certainly noxious ingredients. Figures of speech in the realm of thought are notoriously dangerous. One had best say in plain English that a calling which so deeply involves the well-being of society and is so dependent on the scientific spirit of truth-seeking, but which has few of the aids of scientific verification, calls for men of the highest professional and moral qualities. Disinterestedness and discernment are the prime requisites. As the adjusters of conflicts, judges should be as free as the lot of man permits, from allegiance to any cause or class less than the whole of society. He must be capable of transcending the limitations of his own experience and not confuse the familiar with the necessary. These are not cries for utopia. They are conditions that have been met often enough to prove that society has available the gifts, if it will only use them. The understanding and disinterestedness of a judge largely derive from that by which his imagination is fed.

All history, we are told, is contemporary history. This is certainly true today. And not merely because we see everything through the prism of the world's anguish. Strength to endure comes from confidence, and confidence is rooted in faith. But faith is not self-generated. It is moral energy stored up in the past.



To me being a lawyer, with the full implications of responsibility and opportunity that the word carries, in a society like ours, in a government of laws under a written Constitution, is a calling second to none.

There are creators of ideas and creative translators of ideas into the habits and institutions of society. At their highest the two functions are perhaps never combined in a single person.

The grandeur of the aims of democracy is matched by the difficulties of their achievement. For democracy is the reign of reason and justice on the most extensive scale.

Litigation is, as it were, the pathological aspect of society. Health comes from the thoughts and feelings permeating its atmosphere and guiding its everyday actions.

Nature herself is democratic. The arrangements of society should not thwart her purposes. Tolerance for dissident views is not an exercise in benignity but a form of practical wisdom. Truth is an eternal chase. The history of man's endeavor to achieve truth shows the displacement of yesterday's dogma by today's scepticism. And today's folly may prove itself tomorrow's wisdom. The paths to the City of God must be kept open.

The spirit of man and the means for achieving its glories can never be captured and confined by words and formulas. But the framers of the Bill of Rights put into enduring language the conditions essential for the "Blessings of Liberty" to themselves and their posterity. By celebrating their wisdom in this formulation we invigorate our own strength to maintain that liberty.

As Lincoln has become the moral symbol of this nation, so the verdict of time has agreed on Jefferson as the philosopher of our democratic faith.

The increasing impact of government on the lives of men has put more and more responsibility on the press. As Jefferson so early pointed out, democracy implies the active participation in its affairs by the mass of citizens. This presupposes adequate information as the basis of responsible judgment. Since the press is the chief agency for instructing the public on the issues of the day, and since in our day the world is every man's parish, an informed opinion requires the greatest practicable accuracy and adequacy in the presentation of news.

The need for the widest possible dissemination of information derived from a multiplicity of sources is greater today than ever before because the range of concern of the individual citizen is wider than ever before, is indeed worldwide. But the springs supplying information to the American public have been diminishing. Not the volume of matter offered to readers, but the sources of the reading matter are shrinking, and the competition making for verification of fact and diversity of interpretation is narrowing.

Justice Frankfurter was the recipient of an Honorary Doctorate at Oxford University, England.

The judiciary cannot function properly if what the press does is calculated to disturb the judicial judgment in its duty and its capacity to act solely on the basis of what is before the court. Especially in the administration of the criminal law, independent courts are a prerequisite of a free society. The safety of society and the security of the innocent alike depend upon impartial and wise criminal justice.

Weak characters ought not to be judges, and the scope of free utterance allowed the press for society's sake may assume that they are not. No judge fit to be on the bench is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations.

Every experienced lawyer and judge knows that the atmosphere in the courtroom is subtly susceptible to influence from without.

Too often cases are tried in newspapers before they are tried in court, and thereby the assurance of a fair trial is enormously decreased. The characters, as presented in the newspaper trial, often differ from the real persons who appear later in the court trial, and the latter usually suffer from this unfair distortion.

The radio and television have introduced with powerful impact new forms of the old struggle for the capture of the public's mind and feelings.

The arts exercised in this struggle, the interests excited or neglected, are bound to have vital reflexes upon that amorphous but controlling factor in the conduct of our affairs and the quality of our civilization called public opinion.

It is in the light of these tendencies, these profound functions, and their more or less inevitable distortions, that we must consider the truism that our government and the country's well-being ultimately rest on public opinion. The influence exerted by the public, whether directly through the ballot box or in manifestations between elections, is dependent upon what the ordinary mass of people think and feel about matters. And what they think and feel is more or less what is in the air—not over the air but in the air. The chief source of the views people entertain, what predominantly influences those who read, is not what is said on the editorial pages but what is rubbed off, as it were, from the news columns.

News columns are not only accepted as affording a true narrative of events; through headlines, spacing, repetition, and characterization they subtly infuse the reader's mind and largely influence his standards for judgment. It is the news columns that heavily determine the thinking habits of the reading public. It is they that shape an attitude of lazy credulity receptive to fear and prejudice rather than one of critical open-mindedness.

The unconscious, and therefore, uncritical, absorption of print is much more powerful than any sceptical alertness which most readers bring to print. To an extent far beyond the public's own realization, public opinion is shaped by the kind, the volume, and the quality of news columns. It depends on the quality of the news column, day after day, whether the public's judgment is confused instead of enlightened, whether its feelings are debilitated or steadied, its reason deflected or enlisted. Everything, therefore, depends on what news is presented and how the news is presented.

According to a philosophic observer of the human situation, character is an achievement. It presupposes struggle, a triumph over baser elements in man's nature. Just as the gifts of genius, whether as thinker or artist, are innate, not to be attained by the utmost effort, so, in rare instances, superior moral qualities are born, not made.

When President Franklin D. Roosevelt once observed, "We are all immigrants," he uttered a truism of profound implications. The immigrants who, in fusion, have made the United States, brought diverse gifts to the New World and created diverse problems.

Since continuity with the past is a necessary ingredient of law, significant contributions are largely made by adaptation of past to present, by formulation of a generalization immanent in discrete instances, by absorption of new insights into the nature of man, by responses to new needs of society. If law is not to stifle life but to serve as one of the powerful means for releasing its potentialities, law must be subjected to a constant critical scrutiny in order to be freed from outworn entanglements with the past.

Without a permanent and professional public service, highly trained, imaginative, and courageously disinterested, the democratic aims of our society cannot be achieved. Such a body of public servants is indispensable, no matter what social and economic policies may express the popular will in the executive and legislative branches of the Government.

No enterprise is more complicated than modern government. No enterprise is more in need of skilled and devoted service and a large measure of continuity in that service. That can only come if men of high talents and character and disinterestedness are attracted to government.

It is right that government should not even pretend to compete in salaries by which private enterprise tempts. The satisfaction of government service lies on a different level. But it is wholly wrong to expect right standards of public service from officials whose salaries are too low to enable them to meet the minimum standards of cultivated life. It is even more disastrous that public service, except in the highest offices, should lack public esteem. The tide of opinion should be for and not against public administration as a career for talent. Otherwise the public cannot expect the professional training, the detached judgment, and the moral courage necessary for the conduct of intricate public affairs by men who are not subject to the scrutiny and do not enjoy the glamour of public office.

Comparison of advocates to actors is not a novelty. The fragility of their fame is another thing they have in common. Except in the rare instances where the art of actor or advocate is preserved in the amber of great literature, those who play their part on the stage of the theater or on the private stage of the bar do not survive beyond the memory of their contemporaries.

Political action and nonaction grow out of atmosphere. Without an appreciation of atmosphere the past is apt to be falsified or rendered as caricature; atmosphere evaporates unless recreated by the pen of imaginative, perceptive historians.

He who wields the instruments of criminal justice wields the most terrible instruments of government. In order to assure their just and compassionate use, a prosecutor must have an almost priestlike attitude toward his duties.

As good a test as any of a civilized society is the treatment accorded to those accused of crime. The more fairsounding the provisions of a Bill of Rights, the more it constitutes merely mocking rhetoric unless its professions are translated into the daily administration of justice so that the lowliest of creatures may have ample opportunity to prove their innocence.

We accept our destiny to work, to fight, to die for ideal aims.

O. W. Holmes

SUPREME VOICE OF THE SUPREME COURT

by Felix Frankfurter

MR. JUSTICE HOLMES WAS BORN on March 8, 1841, and died on March 6, 1935. He thus lived within two days of ninety-four years. It is somewhat difficult to try to expound briefly the significance of this great man's long and active life. Necessarily, therefore, his achievements and their abiding importance will have to be conveyed inadequately, though, let us hope, with fair balance and in proper perspective.

Holmes was rooted in the Puritan tradition, and his personal attachment to its meaning and environment went deep. "I love every brick and shingle of the old Massachusetts towns where once they worked and prayed," he said of his Puritan ancestors in one of his frequent references to them. After leaving Boston, he regularly returned to its nearby North Shore to enjoy each year its dunes and rocks and barberry bushes with refreshing devotion. But even as a college student he was a Bostonian apart. Very early his curiosities far transcended his emotional attachments. From the time—before he was twenty—that he learned from Emerson the lesson of intellectual independence, his quest for understanding was hemmed in neither by geography nor by personal preferences. So whole-souled was his love of country that only fools could misunderstand when he said, "I do not pin my dreams for the future to my country or even to my race. . . . I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand." New Englander of New Englanders in his feelings all his life, Holmes disciplined himself against any kind of parochialism in his thinking. Because he so completely rid himself of it, he is a significant figure in the history of civilization and not merely a commanding American figure.

As a truth-seeking Puritan, then, he entered Harvard in the fall of 1857. But before he was graduated came the Civil War and Lincoln's call for men. In April, 1861, Holmes, just turned twenty, enlisted, and on September 4 he started south with his beloved regiment, the 20th Massachusetts, part of the Army of the Potomac, to share, except when disabled, in its notable history. Three times he was put out of action; his war experiences are the stuff of heroic tales.

On his return to Boston, invalided from the front, his personal distinction and his war record irresistibly combined to make of him a military hero. Bishop William Lawrence gives the contemporary picture: "I saw him, a young officer, marching off to the front . . . I watched his record, for we boys were alert to the heroes of those days, and as he was brought back wounded again and again . . . he was seen on the streets of Boston, a handsome invalid, to the great delectation of the girls of the city. He was a romantic hero, built for it." He himself harbored no romantic notions about war. He saw too much of it. Indeed, he shocked patriotic sentimentalists by speaking of war as an "organized bore," just as later he was to offend those whom he regarded as social sentimentalists by his insistence that war is merely a phase of that permanent struggle which is the law of life.

"War, when you are at it, is horrible and dull. It is only when time has passed that you see that its message was divine. I hope it may be long before we are called again to sit at that master's feet. But some teacher of the kind we all need. In this smug, over-safe corner of the world we need it, that we may realize that our comfortable routine is no eternal necessity of things, but merely a little space of calm in the midst of the tempestuous untamed streaming of the world, and in order that we may be ready for danger. We need it in this time of individualist negations, with its literature of French and American humor, revolting at discipline, loving fleshpots, and denying that anything is worthy of reverence—in order that we may remember all that buffoons forget. We need it everywhere and at all times."

Painting of Oliver Wendell Holmes, by Charles Hopkinson.

These were the convictions he took out of the Civil War. These were the ideas that dominated him for the long years to come, for the Civil War probably cut into him more deeply than any other influence in his life. If it did not generate, it certainly fixed his conception of man's destiny. "I care not very much for the form if in some way he has learned that he cannot set himself over against the universe as a rival god, to criticize it, or to shake his fist at the skies, but that his meaning is its meaning, his only worth is as a part of it, as a humble instrument of the universal power."

This faith he expressed as a returning soldier and he repeated it, in enduring phrases endlessly varied, for seventy years in talk, in letters, in speeches, in opinions. But his "Soldier's Faith" was not merely an eloquent avowal of his philosophic beliefs regarding man's destiny, nor was it a gifted man's expression, in emotionally charged phrases, of what seemed to him "the key to intellectual salvation" as well as "the key to happiness." Holmes lived his faith. It would be difficult to conceive a life more self-conscious of its directions and more loyal in action to the faith which it espoused. His faith determined the very few personal choices he was called upon to make after he left the army; it was translated into concreteness in the multifarious cases that came before him for judgment for half a century.

He left the army because his term was up. In later life he said that if he had to do it again he would have stayed through the war. Instead, in the fall of 1864, he began the study of law. On graduating from Harvard Law School in 1866, he made the first of his numerous visits to England.

England had a strong pull for Holmes. "I value everything that shows the quiet unmelodramatic power to stand and take it in your people," wrote Holmes to Sir Frederick Pollock early in World War I. But he could be sharp in detecting any tendency toward condescension or insensitiveness. He was a proud American who had no sympathy with suggestions of inadequacy of the American environment for finer sensibilities.

After his visit to England, Holmes settled down to the serious business of law. He entered it with strong misgivings and not for years were they quieted. The magnetic disturbance was philosophy. But in 1886, to students whom his old anxieties might beset, he was able to say "no longer with any doubt—that a man may live greatly in the law as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."

In 1867 he was admitted to the bar and began to practice his profession. With fierce assiduity he set himself to become master of his calling. "I should think Wendell worked too hard," wrote William James in 1869, and the theme recurs in the correspondence of the James family. Holmes never made a fetish of long hours, however; indeed, he believed that what he called work—really creative labor—could not be pursued for more than four hours a day. But he worked with almost feverish intensity. Holmes soaked himself in the details of the law. When he began, "the law presented itself as a ragbag of details. . . . it was not without anguish that one asked oneself whether the subject was worthy of the interest of an intelligent man." But his imaginative and philosophic faculties imparted life and meaning to dry details. Where others found only unrelated instances he saw vital connection. Thus it was true of him, as he said of another, that his knowledge "was converted into the organic tissue of wisdom."

During all these years he was in active practice, getting desirable glimpses into actualities. But his temperament being what it was, scholarly pursuits, though a sideline, doubtless enlisted his deepest interests. He would have welcomed appointment to the United States District Court for the greater intellectual freedom it would have afforded him. But destiny had other plans for him.

The early writings of Holmes canvassed issues which are vital to a society devoted to justice according to law. What are the sources of law and what are its sanctions? What is appropriate lawmaking by courts and what should be left to legislation? What are the ingredients, conscious or unconscious, of adjudication? What are the wise demands of precedent and when should the judicial process feel unbound by its past? Such were the inquiries that guided Holmes's investigations at a time when law was generally treated as a body of settled doctrines from which answers to the new problems of a rapidly industrialized society were to be derived by a process of logical deduction. But in rejecting a view of law which regarded it as a merely logical unfolding Holmes had nothing in common with later tendencies toward a retreat from reason. By disproving formal logic as the revealer of social wisdom he did not embrace antirationalism. Quite the contrary. His faith was in reason and in motives not confined to material or instinctive desires. He refused to believe the theory that "the Constitution primarily represents the triumph of the money power over democratic agrarianism and individualism . . . I shall believe until compelled to think otherwise that they (the leaders in establishing the Union) wanted to make a nation and invested (bet) on the belief that they would make one, not that they wanted a powerful government because they had invested. Belittling arguments always have a force of their own, but you and I believe that high-mindedness is not impossible to man." Equally so, while fully aware of the clash of interests in society and of law's mediating function, Holmes had nothing in common with the crude notion according to which law is merely the verbalization of prevailing force and appetites.

But at a time when judges boasted a want of philosophy, Holmes realized that decisions are functions of some juristic philosophy, and that awareness of the considerations that move beneath the surface of logical form is the prime requisite of a civilized system of law. In his analysis of judicial psychology, he was conscious of the role of the unconscious more than a generation before Freud began to influence modern psychology.

In 1881, before he was forty, he published *The Common Law*. The book marks an epoch for law and learning. Together with half a dozen of his essays, *The Common Law* gave the most powerful direction to legal science. He reoriented legal inquiry. The book is a classic in the sense that its stock of ideas has been absorbed and become part of common juristic thought. A few of its opening sentences give its drift. They represent the thought of today more truly than the temper of the time in which they were written. More than sixty years ago they placed law in a perspective which legal scholarship ever since has merely confirmed.

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."

A work of such seminal scholarship as *The Common Law* makes

its way only slowly in affecting the mode of thought of practitioners and judges; but it achieved prompt recognition from the learned world. Its immediate result was a call to Holmes from the Harvard Law School. But he soon exchanged the chair for the bench. On January 3, 1883, Holmes took his seat on the highest court of Massachusetts and for close to half a century he remained a judge.

The stream of litigation that flowed though such an important tribunal as the Supreme Judicial Court of Massachusetts during the twenty years of his incumbency enabled Holmes to fertilize the whole vast field of law. Although questions came before him in the unpremeditated order of litigation, his Massachusetts opinions—nearly thirteen hundred, scattered in fifty forbidding volumes—would, if appropriately brought together, constitute the most comprehensive and philosophic body of American law for any period of its history. For him they had the painful inadequacy of one whose aim was the unattainable.

"I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime. A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law has ever presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of expedience real or supposed!"

Such standards were doubtless stimulating to a bar, but were hardly calculated to receive universal approval. We have a trustworthy view of him as he appeared to lawyers who came before him in Massachusetts:

"Nobody who sat on this Court in my time had quite such a daunting personality—to a young lawyer at least. He was entirely courteous, but his mind was so extraordinarily quick and incisive, he was such an alert and sharply attentive listener, his questions went so to the root of the case, that it was rather an ordeal to appear before him. In arguing a case you felt that when your sentence was half done he had seen the end of it, and before the argument was a third finished that he had seen the whole course of reasoning and was wondering whether it was sound."

He hated long-windedness and recommended to the gentlemen of the bar the reading of French novels to cultivate the art of innuendo. He expressed himself, however, with sufficient explicitness in some labor cases to be deemed "dangerous" in important circles in Boston. Such was the direction of his thought at the time that a dissenting opinion which has since established itself as a great landmark in legal analysis on both sides of the Atlantic was seriously felt to be an obstacle to his judicial promotion. He had simply adhered to his detached view of the law and refused to translate fear of "socialism" "into doctrines that had no proper place in the Constitution or the common law."

He became Chief Justice of Massachusetts on August 5, 1899; and the very opinions which disturbed the conservatism of Boston were in part the influences that led President Theodore Roosevelt to look in Holmes's direction when a vacancy occurred on the Supreme Bench.

Holmes took his seat on December 8, 1902. He came to the Court at a time when vigorous legislative activity reflected changing social conceptions, which in turn were stimulated by vast technological development. What was in the air has been well epitomized by the observation that Theodore Roosevelt "was the first President of the United States who openly proposed to use the powers of political government for the purpose of affecting the distribution of wealth in the interest of the golden mean."

Though formally the product of ordinary lawsuits, constitutional law differs profoundly from ordinary law. Constitutional law is the body of doctrines by which the Supreme Court marks the boundaries between national and state action and by means of which it mediates between citizen and government. The Court thus exercises functions that determine vital arrangements in the government of the American people. The adjustments are based, for the most part, on very broad provisions of the Constitution. Words like "liberty" and phrases like "due process of law" and "regulate Commerce . . . among the several States," furnish the text for the judgment upon the validity of governmental action directed toward the infinite variety of social and economic facts. But these are words and phrases of "convenient vagueness." They unavoidably give wide judicial latitude in determining the undefined and ever-shifting boundaries between State and Nation, between freedom and authority. In a federated nation, especially one as vast in its territory and varied in its interests as the United States, the power must be somewhere to make the necessary accommodation between the central government and the states. The agency, moreover, must be one not subject to the vicissitudes and pressures under which the political branches of government rest. The Supreme Court is that ultimate arbiter.

Holmes's profound analysis of the sources of our law before he became a judge left in him an abiding awareness of the limited validity of legal principles. He never forgot that circumstances had shaped the law in the past, and that the shaping of future law is primarily the business of legislatures. He was therefore keenly sensitive to the subtle forces that are involved in the process of reviewing the judgment of others not as to its wisdom but as to its reasonableness of their belief in its wisdom. As society became more and more complicated and individual experience correspondingly narrower, tolerance and humility in passing judgment on the experience and beliefs of legislators emerge as the decisive factors in constitutional adjudication. No judge could be more aware than was Holmes of these subtle aspects of the business of deciding constitutional cases. He read omnivorously to "multiply my scepticisms." His imagination and humility, rigorously cultivated, enabled him to transcend the narrowness of his immediate experience. Probably no man who ever sat on the Court was by temperament and discipline freer from emotional commitments compelling him to translate his own economic or social views into constitutional commands. He did not read merely his own mind to discover the powers that may be exercised by a great nation. His personal views often ran counter to legislation which came before him for judgment. He privately distrusted attempts at improving society by what he deemed futile if not mischievous economic tinkering. But that was not his business. It was not for him to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state. The duty of the Court was to keep the ring free. He reached the democratic result by the philosophic route of scepticism—by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest.

He gave such ample scope to legislative judgment on economic policy because he knew so well to what great extent social arrangements are conditioned by time and circumstances. He also knew that we have "few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumnus mutare* as against the law-making power." But social development is an effective process of trial and error only if there is the fullest possible opportunity for the free play of the mind. He therefore attributed very different legal significance to those liberties which history has attested as the indispensable conditions of a free society

from that which he attached to liberties which derived merely from shifting economic arrangements. Even freedom of speech, however, he did not erect into a dogma of absolute validity nor did he enforce it to doctrinaire limits.

For him the Constitution was not a literary document but an instrument of government. As such it was to be regarded not as an occasion for juggling with words but as a means for ordering the life of a people. It had its roots in the past—"historic continuity with the past," he reminded his hearers, "is not a duty, it is only a necessity"—but it was also designed for the unknown future. This conception of the Constitution was the background against which he projected every inquiry into the scope of a specific power or specific limitation. That the Constitution is a framework of great governmental powers to be exercised for great public ends was for him not a pale intellectual concept. It dominated his process of constitutional adjudication. His opinions, composed in harmony with his dominating attitude toward the Constitution, recognized an organism within which the dynamic life of a free society can unfold and flourish. From his constitutional opinions there emerges the conception of a Nation adequate to its national and international tasks, whose federated States, though subordinate to central authority for national purposes, have ample power for their diverse local needs. He was mindful of the Union which he helped to preserve at Ball's Bluff, Antietam, and Fredericksburg. He was equally alert to assure scope for the States in matters peculiarly theirs because not within the reach of Congress.

With his vast learning he combined extraordinary rapidity of decision. His opinions were felicitous distillates of these faculties. His genius—put to service by rigorous self-discipline and deep learning—was to go for the essentials and express them with stinging brevity. He was impatient with laboring the obvious as a form of looseness, for looseness and stuffiness equally bored him. He genially suggested that judges need not be heavy to be weighty: ". . . our reports were dull because we had the notion that judicial dignity required solemn fluffy speech, as, when I grew up, everybody wore black frock coats, and black cravats. . . ."

In his opinions the thinker and the artist are superbly fused. In deciding cases, his aim was "to try to strike the jugular." His opinions appear effortless—birds of brilliant plumage pulled from the magician's sleeves. But his correspondence gives glimpses of the great effort that lay behind the seemingly easy achievement. "Of course in letters one simply lets oneself go without thinking of form but in my legal writing I do try to make it decent and I have come fully to agree with Flaubert. He speaks of writing French, but to write any language is enormously hard. To avoid vulgar errors and pitfalls ahead is a job. To arrange the thoughts so that one springs naturally from that which precedes it and to express them with a singing variety is the devil and all." And again: "The eternal effort of art, even the art of writing legal decisions, is to omit all but the essentials."

On the Supreme Court of the United States the expression of dissenting views on constitutional issues has, from the beginning, been deemed almost obligatory. In Washington, therefore, they came from Justice Holmes's pen more frequently than they had in Massachusetts, and sometimes were written with "cold Puritan passion." Some of his weightiest utterances are dissents, but they are dissents that have shaped history. Disproportionate significance has been attached to his dissents, however; they are merely a part of a much larger, organic whole.

After his retirement he played briefly with the suggestion that he put his ultimate thoughts on law between the covers of a small book, but all his life he had been driven by the lash of some duty undone and at last he revelled in the joy of having no unfinished business. Moreover, he felt strongly that he had had his say in the way in which he most cared to express his reflections—scattered in his more than two thousand opinions and in his lean but weighty collection of occasional writings. "I am being happily idle," he wrote to Pollock, "and persuading myself that 91 has outlived duty. . . ." He was no believer in systems. These, he felt, were heavy elaborations of a few insights—*aperçus*, to use his recurring word. Systems die; insights remain, he reiterated. Therefore, a few of his own *aperçus* will give the best clues to his philosophy of law and to his judicial technique in the most important field of his labors.

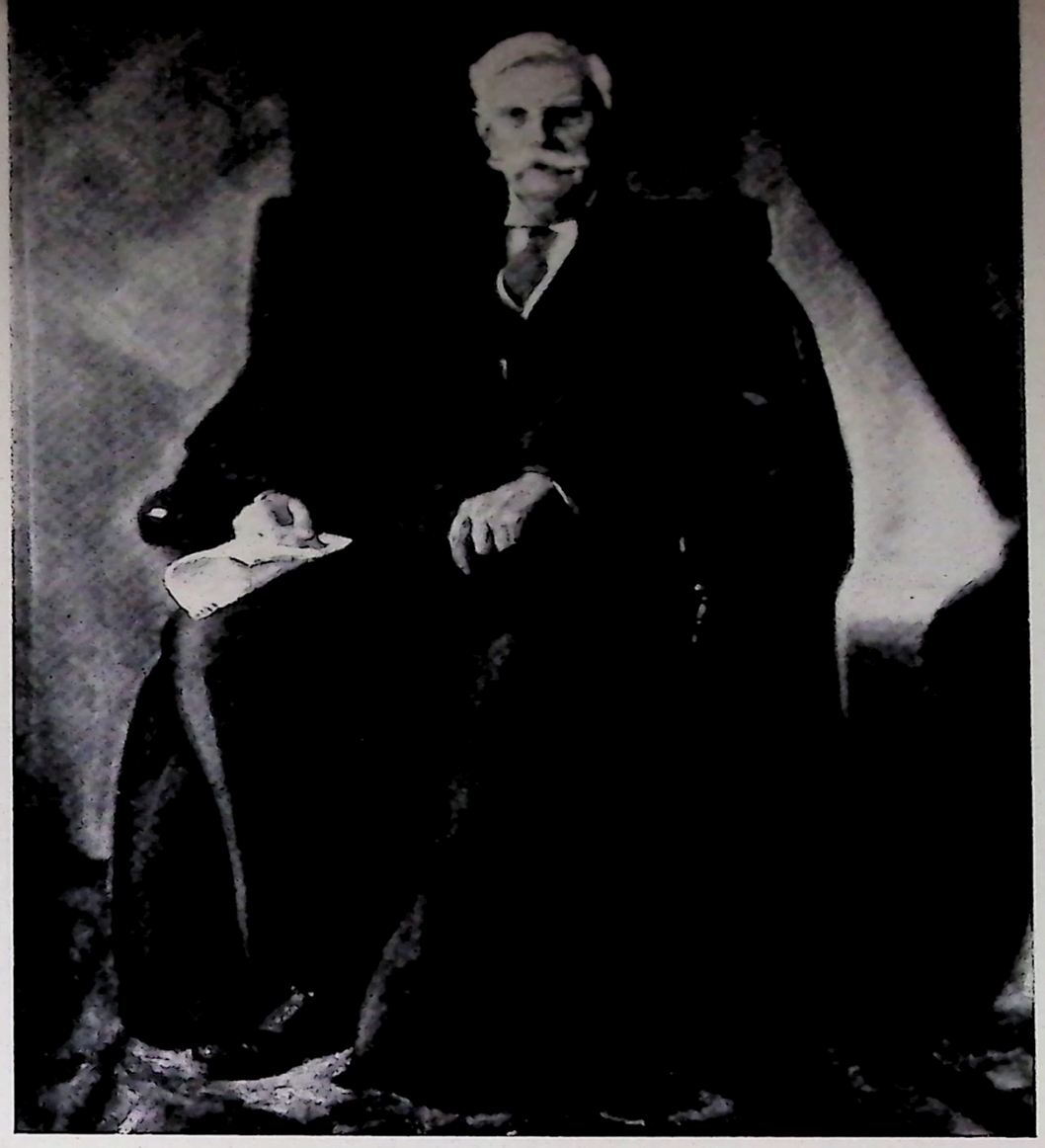
". . . the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

". . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

It is futile to try to account for genius; and the term is not inaptly used for one whom so qualified an appraiser as Mr. Justice Cardozo deemed probably the greatest legal intellect in the history of the English-speaking judiciary. Holmes simply heeded his own deepest impulses. He was born to probe beyond the surface of things, to cut beneath the skin of formulas, however respectable. He looked beneath their decorous formulations and saw them for what they usually are—sententious expressions of overlapping or conflicting social policies. The vital judicial issue is apt, therefore, to be their accommodation. Decisions thus become essentially a matter of drawing lines. Again and again he adverted to that necessity, which he once summed up as follows: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. . . ." Such a view of law of course implies the exercise of choice. But judicial judgment precluded the notion of capricious choice. It assumes judgment between defined claims, each of recognized validity and with a cultural pedigree of its own, but all of which necessarily cannot be completely satisfied. This process of adjustment is bound increasingly to fall to the legislature as interests and activities in society become more and more interdependent. The considerations which thus prompt legislation and the intricate, dubious materials out of which laws are written bring into sharp focus the duty of deference to legislative determinations demanded from the revisory process called adjudicative. In a thousand instances Holmes was loyal to that philosophy. Thereby he resolved into comprehending larger truths the conflicting claims of State and Nation, of liberty and authority, of individual and society.

"It is right and proper that in the reading room of the Harvard Law School the portrait of Holmes should face in equal honor the portrait of Marshall." There fell to Marshall, as Holmes took occasion to say, "perhaps the greatest place that ever was filled by a judge." That Marshall seized it, the role of the Supreme Court in American history bears witness. Holmes's claim to preeminence has



After ninety a man is beyond any duty to improve his mind.

O. W. HOLMES

a different basis. He is unsurpassed in the depth of his penetration into the nature of the judicial process and in the originality of its exposition. His conception of the Constitution cannot be severed from his conception of a judge's function in applying it; and his views of the judge's function derive from his intellectual presuppositions, that is, from his loyal adherence in judicial practice to his philosophic skepticism. His approach to judicial problems was inseparable from his consciously wrought notions of his relations to the universe. These abstractions appear far removed from the particular cases that came before him. But the clarity with which a specific controversy is seen, in the context of the larger intellectual issues beneath the formal surface of litigation, and the disinterestedness with which such analysis guides decision and opinion are the ultimate determinants of American public law.

After a major operation in the summer of 1922, Holmes showed signs of age—he was then in his eighty-second year—but his marvelous physique gradually reasserted itself, though he strictly conserved his energy for his work. Some of his most powerful opinions were written in his ninth decade. Until near the end of his tenure he usually wrote more than his share of opinions. He was nearly eighty-nine when the illness and death of Chief Justice Taft cast upon Holmes for a considerable period the heavy burden of presiding in Court and the still more difficult task of guiding its deliberations at conferences.

The machinery was running down, however, and on January 12, 1932, he sent his resignation to the President—"the time has come and I bow to the inevitable." He continued his serene life, in Washington and in the summers at Beverly Farms, reading and being read to, enjoying the simple and familiar things of nature that had always refreshed him and the devoted attention of friends, especially the young. He had become a very old man but his faculties were never impaired. He had grown almost wistful in his gentleness. The fire of his exciting personality was dying down and on the morning of March 6, 1935, came the end.

With the sure response of the mass of men—given enough time—to goodness and gallantry of spirit, Holmes, the fundamentally solitary thinker, had become a pervasive and intimate national possession. His death elicited an outpouring of feeling throughout the country. But of all the moving things that were said, he would probably have most liked the few words of his old friend and his closest colleague for fifteen years, Mr. Justice Brandeis, when the news was brought to him: "And so the great man is gone." On his ninety-fourth birthday—a raw March day with snow gently falling—he was buried with due military honors in the Arlington National Cemetery, alongside his wife and near his companions, known and unknown, of the Army of the Potomac.

Without accompanying explanation, he left the bulk of his substantial estate to the Nation, the largest unrestricted gift ever made to it. Congress established a Holmes Fund Memorial Commission. In a message to that body recommending an appropriate use of the bequest, President Franklin Roosevelt thus interpreted Holmes's intention: "It is the gift of one who, in war and in peace, devoted his life to its (his country's) service. Clearly he thereby sought, with a generous emphasis, to mark the full measure of his faith in those principles of freedom which the country was founded to preserve." And the President expressed what he deemed to be the country's desire that Congress "translate this gift into a form that may serve as a permanent impulse for the maintenance of the deepest tradition that Mr. Justice Holmes embodied." That tradition, wrote President Roosevelt, "was a faith in the creative possibilities of the law. For him law was an instrument of just relations between man and man. With an insight into its history that no American scholar has surpassed; with a capacity to mold ancient principles to present needs, unique in range and remarkable in prophetic power; with a grasp of its significance as the basis upon which the purposes of men are shaped, Mr. Justice Holmes sought to make the jurisprudence of the United States fulfill the great ends our nation was established to accomplish." ♦

MUSIC TELLS HOW PEOPLE THINK AND ACT

by John Tasker Howard & James Lyons

PLATO WAS SOMETHING OF A PROPHET when he wrote that the introduction of a new style of music must be shunned as imperiling the whole state, since styles of music are never disturbed without affecting the most important institutions. "The new style," he explained, "quietly insinuates itself into manners and customs, and from these it issues a greater force . . . goes on to attack laws and constitutions, displaying the utmost impudence, until it ends by overturning everything, both in public and in private."

He might almost have been writing about the "rock and roll" riots of 1958, and, if he were living in our age, arguing that jazz and swing are responsible for most of the world's troubles. It would indeed be novel to maintain that our social and political systems have been molded by the music that people of every age have played and sung, but we do know that the reverse is true; that the music of each period in history is a reflection of the life, the temperament, and the viewpoints of that era.

It is generally recognized that the songs people sing, particularly the so-called popular songs, provide a year-by-year record of the lives of those people. Superficially, these songs and ballads record happenings of importance, the names and deeds of popular heroes, fashions in dress, slang phrases and colloquialisms, sports and games, occupations and professions, means of transportation, almost everything connected with everyday life. Beneath the surface, however, is even more important information; revelation of states of minds and points of view. Such a record is found not only in the words of songs, but in the spirit of the music itself, in its very style and idiom. If we bear in mind the character and surroundings of the people for whom the music of each age was written, we shall understand their music more clearly. Conversely, the student of history will do well to become familiar with the representative music of the age he is studying. It provides a vivid description of the background that produced historical events, and explains why people acted as they did. Honest music, that which is sincere, is invariably an expression of the era that produced it.

Take, for example, the merry lilt of the English madrigals from the sixteenth century. These songs embody the underlying spirit of Merrie England in the days of the first Queen Elizabeth, when Britain was growing rich and enjoying the things that come with economic prosperity. There was joy in life, and people sang and danced to the jolly strains of music by Byrd and Gibbons.

Moving on a century, to Continental Europe, we approach an era when outer forms become more important than inner thoughts. Instead of being the unrestrained voicing of joy or sorrow, emotional expressions are more polished. Tenderness, rather than passion, marks the art of the day, and beauty is fragile and delicate. The placid beauty of Gluck's melodies is characterized by restraint and chaste refinement.

Johann Sebastian Bach lived in an age (1685–1750) when men did not wear their hearts on their coatsleeves. Thus, superficially, Bach seems to be preoccupied with form and structure, and the emotional depths of his works, almost unfathomable, are apparent only to those who are familiar with them. It was undoubtedly the early eighteenth-century insistence on form that lent this aspect to Bach's music.

This was also an age when the princely rulers of Europe showed their power through costly and elaborate architecture, and we find the composers of the day, Bach included, showing an intense devotion to detail, decorating their music with delicate instrumental patterns that were repeated and imitated contrapuntally.

In the eighteenth century, concert music was not for the people, but for the nobility. Concerts were mostly given in the palaces of kings and princes, not in public concert halls. The musician was not a man of social rank; he generally ate his meals in the servants' hall. Consequently we find a lowly and humble spirit whenever a musician addressed his patron. Today the great Bach has a seat with the immortals, but read the words he addressed to the Margrave of Brandenburg, who is known to us only because he commissioned six concertos from Johann Sebastian Bach. In his letter the composer begged the Margrave not to judge the imperfections of the concertos "by the severity of the fine and delicate taste that every one knows You to have for music, but rather to consider benignly the profound respect and the very humble obedience to which they are meant to testify."

It was naturally the taste of the princely patrons of music that determined the style of music written by composers dependent on these aristocrats for support. And the music, in turn, gives us an intimate picture of the life at their courts. It was a day when art, religion, letters, were highly organized and designed chiefly for the glory of absolute monarchs. The luxurious court at Versailles was the model for every king, prince, and courtier of Europe. Manners were polished and stilted, and conversations were witty and marked by a cynicism that often became malicious. Although the music of Haydn and Mozart is filled with grace and tenderness, and exaltation, too, it is nevertheless highly formalized, dealing with the artificialities rather than the realities of life. The dance forms these composers used—the minuet, the gavotte—picture powdered wigs and knee breeches with silver buckles, rather than the rollicking, boisterous good times of Beethoven's peasant folk. Even when Haydn used Croatian folk songs, he polished them so that they would be fit for the salons of Counts and Barons. If any indication were needed to show the great genius of these composers, it is the fact that their music is spontaneous and vital in spite of the formal restrictions imposed upon it.

It is often said that Beethoven was the link between the so-called classic and romantic periods of music. It is quite true that his early style was a definite reflection of his predecessors, particularly of Mozart, while his mature works represent a break with tradition that ushered in the freedom from convention of the eighteenth-

century romanticists. Compare Beethoven's country dances with any of Haydn's minuets and you will see how one was writing of peasants and villagers where the other wrote of kings and princes.

In music Beethoven was a revolutionary; for his time, almost a radical. He lived in an age of revolutions, when the elegant, cynical courts of Europe were tottering. In 1783 the American colonists won their fight for freedom, and less than ten years later the French Revolution cost Louis the Sixteenth and the beautiful Marie Antoinette their heads as well as their crowns. The sudden sense of liberation gave courage to writers and artists who strove for freedom in expressing their ideas.

Beethoven was a revolutionary in thought, as well as in his music. He caught the spirit of the French revolt, and when Napoleon appeared as an ardent champion of freedom, a leader who would restore order and prosperity to his people, Beethoven put him on a pedestal and resolved to write a symphony in his honor. He began the work in 1803, and by 1804 the first draft was ready. It lay on his desk where all who came to see him could read the name "Bonaparte" inscribed on the title page. Then came the news that Napoleon had assumed the title of Emperor, and the disillusioned Beethoven changed the dedication. But the symphony remained the *Eroica*, the portrait of a hero, a champion of the people, even though Napoleon had ceased to be that hero.

It was such music that prepared the way for the romantic era, when the actual content of music, what it had to say, became more important than the form in which it said it. Before the romanticists, music had seemed to be principally concerned with the classic forms —the sonata, the rondo, the classic dance forms, and others; it was afraid to let itself go and to abandon itself to its mood. With the nineteenth century, and the revolts of the common people that led eventually to the Central Europe uprisings of 1848, artists, musicians, and writers felt free to indulge their fancies. Just as the political thought of the day insisted upon more freedom for the individual, so did art, literature, and music become a more personal expression of the artist's own view of life, rather than that of his patron.

The old forms in music were by no means abandoned; composers still wrote symphonies in the traditional sonata form, but the forms became more elastic, and were adapted to the individual ideas the composers wished to express. Harmonic combinations became richer and more varied, and musicians had the courage to make a freer use of the dissonances.

A closer relationship developed between music and poetry, and poetic ideas. Robert Schumann gave fanciful, descriptive titles to dozens of his piano pieces, and even when he wrote absolute, non-descriptive, music in traditional forms, it was always the personal expression of his poetic nature. The slow movements—from his symphonies, his Piano Quintet, his Piano Concerto—are far more intense and foreboding than the works that come from an earlier century.

Chopin filled his works with sorrow for the tribulations of his native Poland and he also achieved freedom from many of the restrictions of musical convention. He advanced the development of free forms—the fantasy, the impromptu, the ballade—which are forms determined by the musical material itself.

The lovely melodies of Franz Schubert were aimed directly at the hearts of the people around him; they were not designed for lords and ladies in silks and satins. Schubert reflected the time in which he lived, as well as his own lovable nature.

Like Beethoven, Richard Wagner was a freethinker in his philosophy, as well as in his music. During the Revolutions of 1848 his political ideas became so widely known that he was forced to flee to Zurich and live in exile for nearly twelve years. In some of his music-dramas he embodied his social and political ideas. The *Ring*

of the Nibelungs was a protest against forces that Wagner considered evil. And in regard to the music itself, it was the background of the age he lived in that made Wagner dissatisfied with the restrictions that had enslaved the music of an earlier day. He used his great genius to free music from its shackles.

That is the spirit we feel when we listen to the overpowering masterpieces Wagner left us—the upward reaching of a great soul (and he was that in spite of his selfishness and disloyalty to his friends) who longed to be rid of the pettiness of earthly things; a surging that had no patience with formality or even politeness. As we look at history, we realize that this music could not possibly have been composed in the days of Bach, of Haydn, or of Mozart.

The rise of nationalism in music was another movement that had its origin in nineteenth-century history. Just as the coming of democracy dethroned kings and gave to the peoples a new consciousness of their rights and privileges, so also, with the old barriers swept away, and with small duchies overthrown, there came the idea that people speaking the same language and sharing the same customs should be politically united as nations. Thus the political upheavals ushered in not only the romantic era in the arts, but also a feeling for nationalism. Mikhail Glinka, in Russia, was one of the first to express this spirit, and his opera, *A Life for the Tsar*, is generally regarded as the foundation of a distinctively Russian music. Its themes were based largely on Russian folk songs Glinka had heard in his youth, and some of the music was so true to the life of the lower classes of society that a group of noblemen sneeringly called it "the music of coachmen." Following Glinka were other composers of the Russian nationalist school: Borodin, Mussorgsky, Balakirev, Glazunov, Rimsky-Korsakov.

As states became composed of citizens, rather than subjects, the ideas and emotions of nationality were free to develop. The type of thought that shaped institutions and governments also affected the music of those peoples and races that were the most nationalistic in spirit. Czechoslovakia, a nation whose political freedom was denied for several centuries, was typical of this movement. As far back as 1620 the Czechs and Slovaks were brought under the rule of the Austrian Hapsburgs. They were forbidden to speak their own language, and their rulers sought to stamp out all traces of the Czech national spirit. Beneath the surface, however, the national feeling was kept alive, and was probably made more vital by the very oppression that sought to destroy it. In 1859 the restrictions were somewhat relaxed, and Bohemian artists came forward who were filled with the national spirit of their countrymen. The leading composer to express this spirit was Bedřich Smetana, and his opera, *The Bartered Bride*, contains many of the songs and dances of his homeland. After Smetana came Antonín Dvořák, whose *Slavonic Dances* vividly express the color and life of his countrymen.

Jan Sibelius (1865–1957) was one of the most nationalistic of composers, and was universally recognized as the musical voice of Finland. Because his works have been among the most performed of those by present-day composers, he is often looked upon as a modern composer. It is true that his music is contemporary in time, but in spirit he is actually a romanticist, heroic and epic, expressing with rare eloquence the aspirations of his fellow-countrymen. His idiom is unmistakably his own, but it does not enter twentieth-century experimental fields. His First Symphony derived almost directly from Tchaikovsky. In the Second Symphony, composed in 1901, he managed to cast aside the reminders of Tchaikovsky, and wrote a work that the Finns accepted as an expression of their revolt against oppression. Its climaxes rise to exultant heights. The earlier tone poem, *Finlandia*, composed in 1899, expressed so fervently the national spirit of the Finns that its performance was at one time forbidden by the Russian government.

Sibelius's seven symphonies, as well as his tone poems and the Violin Concerto, represent a progressive series of steps in the composer's development. He devised his own structures and evolved his own melodic harmonic style, neither startling nor revolutionary, but altogether typical of Sibelius and of Finland.

In Spain, Italy, Norway, and the British Isles the music of nationalist composers has pictured the temperament of the peoples, their customs and ways of life, their folklore and legends, and the very climates in which they live. The songs and instrumental pieces of Edvard Grieg bring to us the icy blasts of the Northland as vividly as Neapolitan folk songs breathe the warm sunshine of southern Italy.

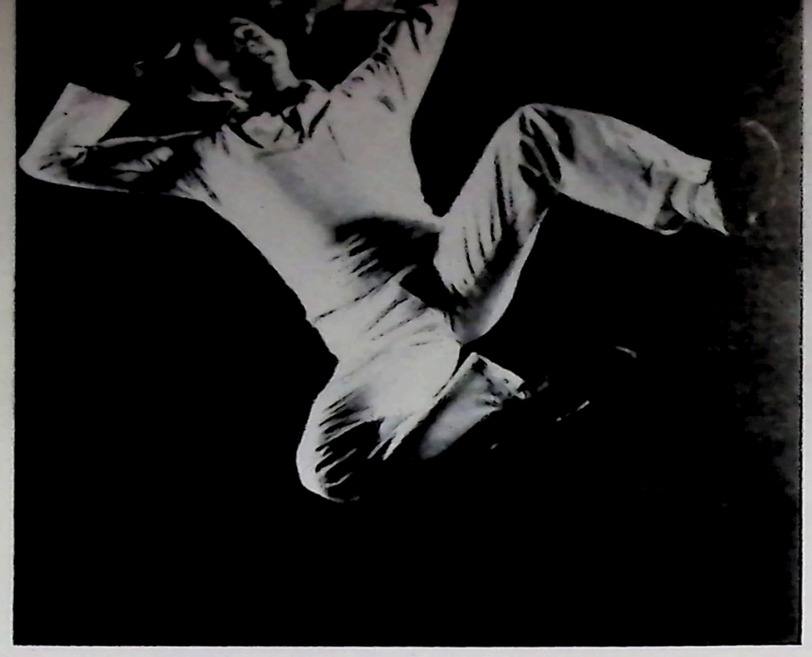
National consciousness in America awakened slowly. We have been such a cosmopolitan nation, composed of so many races of Europe, that our nationalism cannot take the form of a unified racial expression, but must be a spirit that comes from a welding of all the elements that make up our population. True Americanism in art, music, and literature must be based on our ideals, our aspirations, our institutions, and our philosophy. In the twentieth century, when we have become independent in thought, just as we became independent in action a century before, our national spirit is asserting itself, and our composers are writing music that is not a mere reflection of European music, but that actually springs from the cities, the factories, and the countryside of America.

The American, Edward MacDowell (1861–1908), was closely akin to the Norwegian Grieg in being an intense individualist. Like Grieg he developed a style that was so characteristic of himself that it is easily recognized as almost a trade-mark. Yet while MacDowell was eager to encourage and help to develop a group of composers who would be distinctively American, he did not believe that nationalism in music could be consciously acquired. Returning to America at the time the Bohemian Dvořák was resident in this country and was urging American composers to turn to Negro and Indian folk music as a reservoir of native material, MacDowell disagreed, for he did not think that our music could become typically American merely by borrowing tunes that had originated on our soil. He felt that nationalism is an extraneous element that has no part in pure art. Rather than depend on folk music, the composer to write truly American music must arrive at "the youthful optimistic vitality and the undaunted tenacity that characterizes the American." Therefore, although he was a postromantic in feeling and his music shows a Celtic spirit tempered by German romanticism, he considered that as an American he was writing American music.

Howard Hanson, director of the Eastman School of Music and one of our leading contemporary composers, has been able in his teaching to pass to his composition pupils his altogether sound ideas on nationalism in American music. Himself of Swedish descent, he has shown his Scandinavian heritage most distinctly in such works as his *Nordic Symphony*, and yet his own characteristically American viewpoint has tempered his heritage so that it is altogether recognizable as belonging to this country.

Hanson believes that every race must write its own music, and that truly American music must come out of the life of America. To him American music is simply music written by Americans, and it does not matter whether the composers are descendants of New England or Virginia settlers, or whether they are the sons or daughters of recently arrived immigrants. He is not an advocate of anything that might be termed an American "school" in music, but he does believe that American music has acquired nationalistic traits, in the definite personalities of many of our younger composers, and in the spiritual individuality of their works.

There has been nationalism in Latin America as well as in the United States. Curiously, one of the most national of the South



Americans, the Brazilian Heitor Villa-Lobos, is at the same time one of the most international of composers. According to Howard Hanson's definition Villa-Lobos would be distinctly a Brazilian composer for he was born in Rio de Janeiro and still makes his home there, yet he has written every conceivable kind of music. By 1956 he had completed over two thousand works.

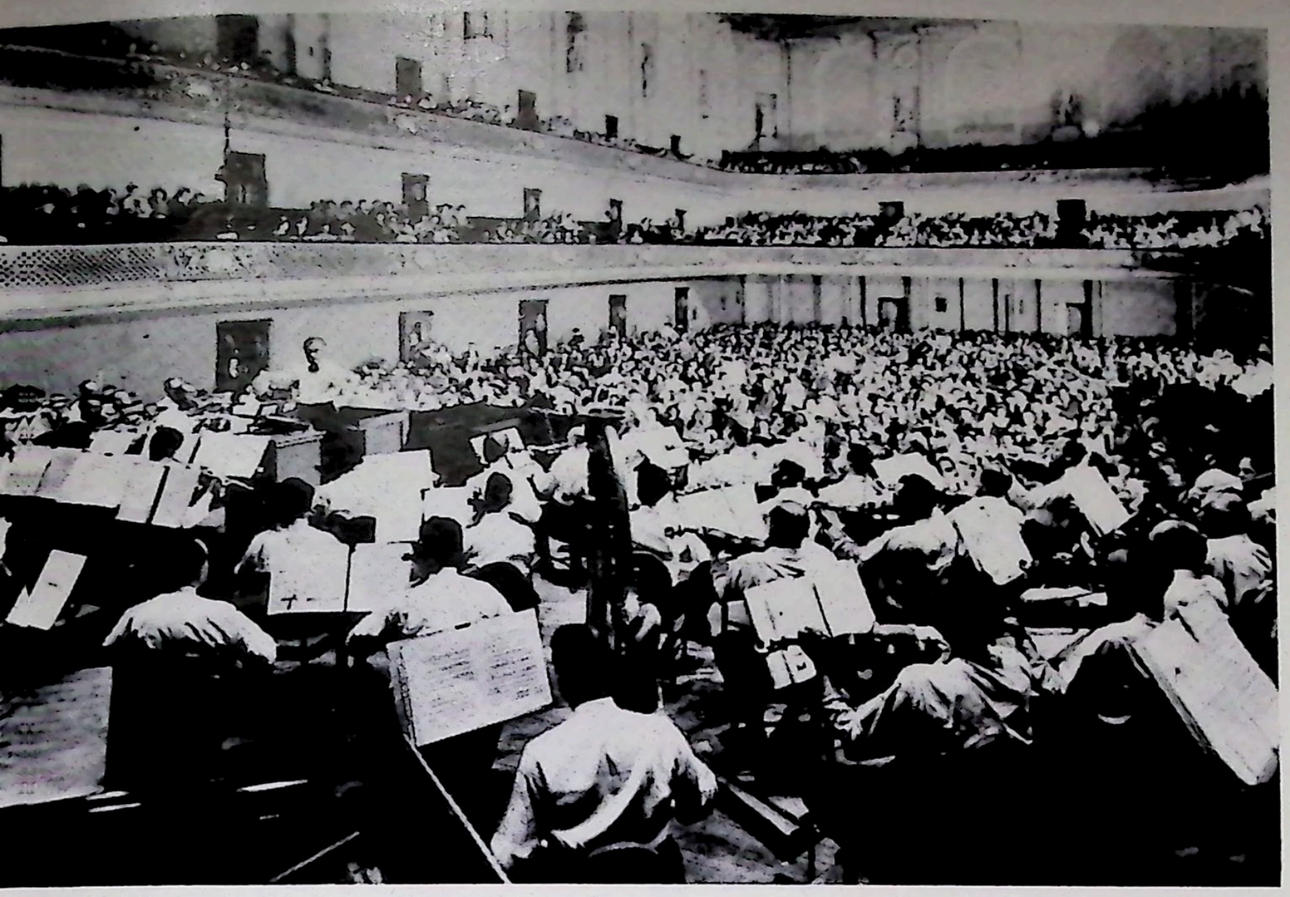
Doubtless the indigenous music of his native land has played a part in shaping the all-inclusive Villa-Lobos idiom, if anything that is so multisided could be called an idiom. Many of his works bring reminders of jungle evocations and the atmosphere of the tropics. Jay S. Harrison, writing in the New York *Herald Tribune*, has insisted that the "tragedy" of Villa-Lobos "is founded on his own fantastic virtuosity," and no one can deny the composer his command of technical resources in composing for the modern orchestra. But, as Harrison continues, "he speaks with such facility that he rarely considers the nature of his discourse. . . . As a result, his pieces sound for all the world like a tonal equivalent of a patchwork quilt."

In his series of thirteen orchestral pieces entitled *Chôros*, Villa-Lobos attempts what he terms a "personal synthesis" of various types of Brazilian music. The word "Chôros" is the Portuguese for serenade. In another set of orchestral works, *Bachianas Brasileiras*, he has tried to show how Bach might have handled melodic material indigenous to his native country.

We find, then, that all movements and changes—political, social, economic—that have affected the direction and course of human life have shaped the character of the music of various ages, just as they have affected literature and the other arts. After romanticism came postromanticism, somewhat decadent, and often filled with the neuroticism of a Tchaikovsky. This was an era of general decadence, when new changes were on the horizon, but when established customs were still so firmly intrenched that to question them was to place oneself apart from convention. The conventions and the traditions had grown soft, however, and lacked the rugged vitality of an earlier century, when they themselves had been revolutionary, and had replaced those of a still earlier day.

And so we come to our own time, when our music is showing such startling changes, such radical departures from older music, that it seems to the traditionalist to be nothing but inexcusable noise. But once again we have merely to consider the events of our own time to find the reason. Even before the first World War, life had become more complex than it had ever been before. The changes that have occurred so rapidly and so suddenly would have required centuries in the Middle Ages. Science and invention have made such rapid strides in the last quarter-century that civilization will require several generations to catch up with them, and to learn how to use their products intelligently. Where the first World War seemed to be a liberation of oppressed peoples—Czechoslovakia, Poland, Finland—the second World War was caused by the resubjugation of free peoples by totalitarian states. When the Allied victory liberated enslaved nations from the Fascist yoke another aggressor arose to make satellites of nations that had temporarily regained their independence. And now the art of these peoples is controlled by those who govern them; composers may write only such music as embodies the current ideology of political dictatorships.

In America we are free to voice our feelings, and so are those composers from abroad who have come to our shores. America has become the cradle of an art that will tell the future historian how people felt and acted in these troubled times.

Our modern music tells of the feverish pace at which we are living. When we dance, we have not the patience for the slow steps of the minuet, or the smooth, gliding motions of the waltz; we spend our energies on the feverish rhythms and motions of the latest dances. Life is so much more complex that our young people are as sophis-

ticated as their grandfathers, and as wise, if not wiser, in the affairs of the world. So our music is complex and sophisticated, and much of it, particularly our popular music, appeals chiefly to the younger generation.

It is, perhaps, the noisiness and confusion of our modern music that disturb us most. But they, too, are a direct reflection of modern life. Carl Engel wrote of this in 1928, in an article entitled "Harking Back and Looking Forward":

"What we need most of all is an explanation for the probable connection between the latest changes in music and the increase in noise. The progress of music is based on and conditioned by the necessity of constantly overcoming fatigue. And the fatigue of the ear has been hastened or aggravated by the alarming increase in noise to which modern life is subjecting us. Probably our whole nervous system is affected by it, and not to its profit. Where two hundred years ago melodious street-calls announced the approach of itinerant vendors and the song of an ungreased axle-tree merely emphasized the ordinary stillness, we have now the involved and strident counterpoint of traffic over an ostinato of policemen's whistles and automobile horns. The timid tinkle of the spinet has been replaced by the aggressive tones of the 'loud speaker.' Loudness and coarseness go hand in hand. Pandemonium in the street, and the home a jazz dive or a roaring Chautauqua—truly the art of music is hard put to devise new stimuli wherewith to counteract the growing aural disturbance. The wonderful and consoling fact is that music, apparently, is equal to any occasion."

It is significant that dissonance in itself does not bother our young people in the least. They have been brought up on it and in the field of "popular" music have not been compelled to make the adaptation from the leisurely syncopation of ragtime to the frenetic chaos of modern hot jazz. Perhaps, then, it is because older ears are tuned to the nineteenth century that they are constantly comparing our new music with that of their youth. If they had never heard Beethoven or Mozart, Schoenberg and Stravinsky might not sound strange at all. Certainly traditional Hindu music seems perfectly natural to the Hindus, yet to us its scales are strange and new, and its rhythms almost incomprehensible.

We may well wonder what the music of the future will be, and where some of the recent experiments may take us. There are of course distinct signs of a reaction from some of the more bizarre extremities of the past quarter-century, and we shall find in our later chapters how the younger composers are less concerned with the methods they use than with what they actually have to say. They adopt what they think will serve their purpose from the various devices they have learned and, not fearing sometimes to write even a simple tonic triad, they combine them into a medium for expressing in their own way the emotions that have caused them to write their music.

Whatever course the development of modern music takes, of one thing we may be certain: it will definitely reflect its background, and the ultimate fate of civilization will be vividly recorded in the music that is composed during the coming years. Aspirations, ideals, as well as frustrations, will prove the determining factors in shaping this art expression, and the various devices and patterns of atonality and polytonality will be only the means by which the composer will convey his inner thoughts to his audience. ♦

WANTED: *a faith to remove mountains*

by Thomas S. Kepler

RONALD KNOX HAS AN INTRIGUING BOOK about the fascinating topic, *enthusiasm*. He describes how great movements like those of the Quakers, the Moravians, and the Methodists in the seventeenth and eighteenth centuries were movements of great enthusiasm, begun by leaders of great faith. In describing an enthusiast, he says that he is one who "expects more evident results from the grace of God than we others" and that such enthusiasm, wedded to great faith, transforms a man's whole life and outlook. Life that is governed by faith and enthusiasm is the type Jesus had in mind when he said, "Nothing will be impossible to you." It is the type of motivation in a person which can remove mountains!

Every person wants a big faith, for every normal person wants to make the most of his experience on earth. But a *big faith begins in belief that this is a spiritual universe*. Belief has its intellectual value. William James said in his great Gifford lectures that the average person in middle age who does not believe in a God who answers prayer, and who ensures personal immortality after the grave, will grow sullen, caustic, melancholy, and even bestial. It was only a belief in a God who cared that saved Leo Tolstoy from suicide and gave him his impetus for his heroic attempt to live the Christian life.

Christian faith is discussed about 250 times in the New Testament. It is a favorite subject on Jesus' lips as he encourages his disciples to do the impossible, or as he tries to quiet their fears amid a storm at sea. In speaking about Jesus' concept of faith, Adolph Harnack said that it was so simple that a child could understand it, yet so complex that the finest mind could not exhaust it. Many people today have lost their urge to live with greatness, because their faith in God has become warped.

One of the great "mountains" which Christians of the Western world want to remove is that of the Communist threat to our culture. Perhaps we can wisely listen to the words spoken by Voltaire 175 years ago. When Benjamin Franklin went to France during the days of the Revolutionary War to solicit aid from the people of that country, he took his grandson with him as his secretary. Before returning to this country, Franklin took his grandson to meet Voltaire. On leaving, the aged French seer said to young Franklin, "Young man, never forget two words, 'God and freedom.' " Nor should we forget them today, for they go together, just as atheism and slavery are partners. Belief in God is one of the essentials if we are to overthrow the Communist threat.

If a person is going to have a faith to accomplish the almost impossible, that is, to remove mountains, *he needs to read trust into his understanding of faith*. Those who understand the meaning of a faith which possesses trust are persons whose experiences have taught them such a lesson. Dr. William Ousler, a Baltimore physician who has seen patients bettered by faith, says: "Nothing in life is more wonderful than faith." J. M. Barrie, the playwright, remarked: "To have faith is to have wings." Arthur Compton, Nobel prize winner in physics, has written: "Every great discovery I ever made I gambled that the truth was there, and then I acted on it in faith until I could prove its existence." Whether in the search to obtain mental health, or to find life meaningful in terms of a great adventure, or to probe into the universe for scientific truth, a *trust* in God as the Great Companion, who has something to give to us who search, is basic for an adventuresome religion!

It is easy to trust God when all goes well, but when life grows difficult and tragedy meets us, the real test of a person's trust

arrives. It is then that we either *use* or *lose* our religion. The real test of a faith which has trust comes when, in a tragic moment, a person can say with Paul: "We know that in everything God works for good with those who love Him, who are called according to His purpose."

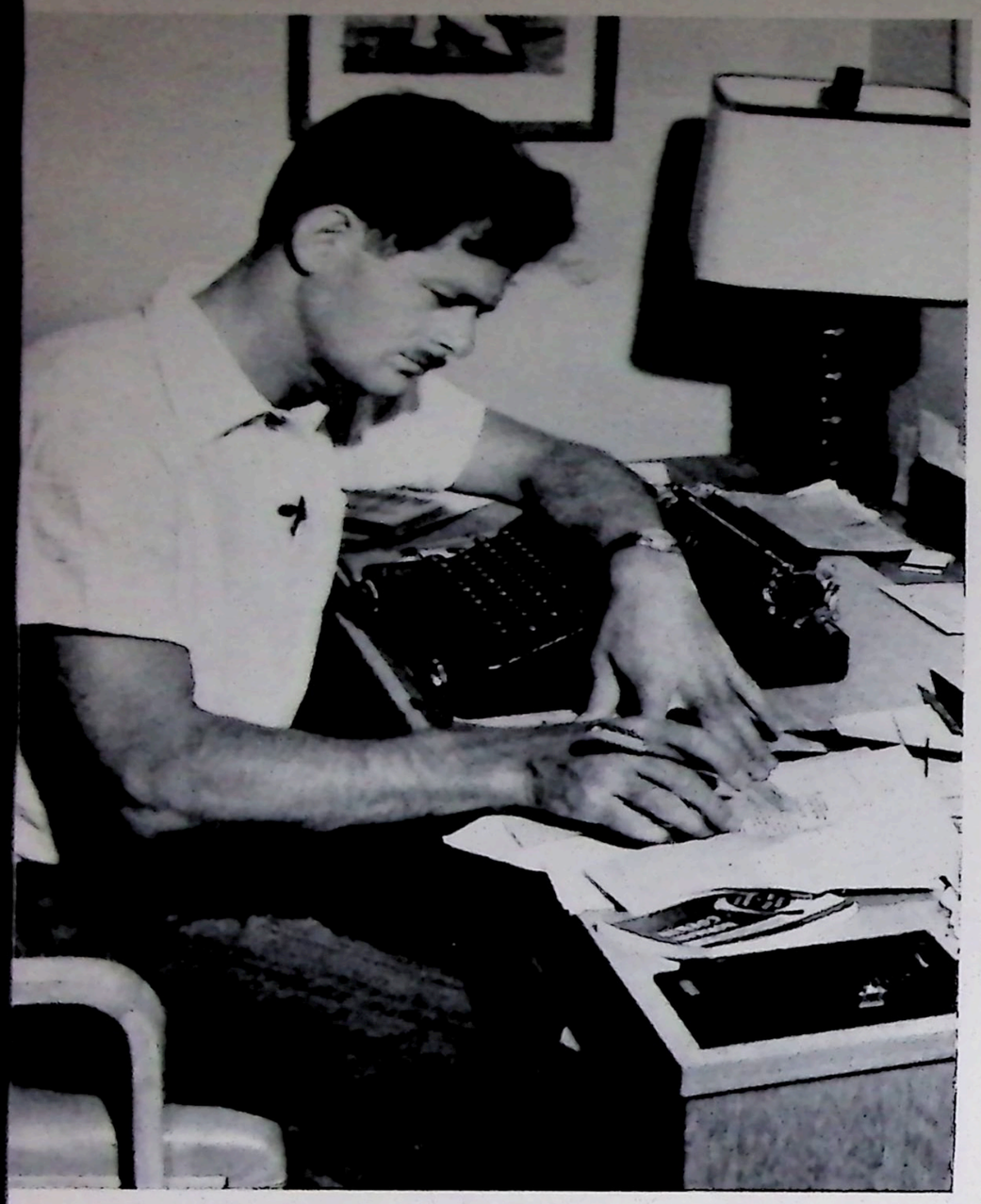
Faith helps us to get along with ourselves and become instruments through whom God's mercy, wisdom, and power channel into other persons. Emerson once said that if you hold a tiny straw in the right direction, the great Gulf Stream could flow through it, and that man, in placing his soul in the right mood toward God, could allow God, as the "Oversoul," to flow through him. Fear and pride close the gates of the soul to God; faith opens them. Frank Laubach says, "Beware that your old mind-set does not block God. Open the soul wide without *if*, *but*, or *except* through which His healing power can flow." Clement of Alexandria comments that faith leads to knowledge, knowledge leads to love, and this love unites the knower (man) with the known (God). Such a faith creates mental health.

Religious psychologists tell us that selfishness, fear, resentment, and guilt keep us from getting along with ourselves: they bar us from becoming useful instruments of God's spirit. The prospective son-in-law of Gerald O'Hara, in *Gone with the Wind*, is discussing Gerald at his funeral: "There warn't nothing that come to him from the outside that could lick him. But he had our failin's too, cause he could be licked from the inside. I mean to say what the whole world couldn't do, his own heart could." In a more delicate way Bernard of Clairvaux says, "Nothing can work me damage except myself. I am a real sufferer by my own fault."

The one who spoke words about men having a faith to remove mountains also left precepts as to how men might become instruments of God's spirit, so that they might get along with themselves and become instruments through whom God's spirit might flow into other lives: "Do not be anxious about your life. Which of you being anxious can add one cubit to his span of life? If God so clothes the grass of the field, which today is alive and tomorrow is thrown into the oven, will He not much more clothe you, O men of little faith?" When a person ponders these spiritual suggestions seriously, he realizes that nine-tenths of his worries are imaginary, largely caused because he has no abiding religious perspective of life, and that he needs a God-centeredness instead of a self-centeredness.

A common illustration which keeps recurring in the writings of the saints is that of the gardener. The gardener observes the parched condition of his bed of flowers; he fills his watering can and then pours his water on the plants; and in time they bud and bloom. Man is like that: as he allows himself, through his trust, to become filled with God's spirit, he then becomes a channel or an instrument through whom God's love, wisdom, and power are redemptively poured into the social scene; thereby he becomes a means by which God's spirit can help needy persons in the world.

Man is meant, according to Jesus, to have a faith that can remove mountains, that can attempt the impossible; but it must first begin in transforming an individual into the kind of self that can remove the "little mountains" within himself of fear, selfishness, resentment, and guilt. Then, as a transformed personality, he has the courage to go into the social scenes of history to help remove the towering mountains of social evils! In this way God's kingdom is meant to arrive for both the individual and society. ♦



Author Norman Corwin has received many awards from newspapers, radio, television, and motion pictures for distinguished writing.

SHAPING LANGUAGE TO THOUGHT

by John Matthews Manly & Edith Rickert

THE MAN WHO WOULD SUCCEED TODAY must be able to use his native tongue. If he can speak or write so that his words will have upon those who listen or read the effect which he desires, he is master of one of the great sources of power. To realize this fact is to see that the art of expression is not an ornament for the few, but a tool without which no ambitious man can be properly equipped for life.

If you will consider the leaders in every line of work—finance, industry, commerce—you will see that the leader is the man who not merely has ideas, but can make other men believe in them. On the other hand, men who have good ideas but cannot express them well are always at the mercy of others, who steal their thoughts and re-shape them in words of power.

Again, the theory that good writing depends upon a special talent has been exploded. This theory grew out of confusing genius with workmanship. A genius is a being of marked originality, whose self-expression may be helped or hindered by special training. But any intelligent person can be trained to become a successful workman in the art of shaping language to thought. His degree of success will depend largely upon a single factor—the active interest which he brings to bear upon the process of learning.

Accurately speaking, arts and crafts of whatever character cannot be taught; they can only be learned: that is, no amount of passive subjection to instruction will ever turn out even a good craftsman. He who is content to acquire the processes in a mechanical way and to execute them without thought will always remain a common workman; he who applies to the processes of his work and the reasons for them eager and patient thought will inevitably become a master of his craft; he who adds to these the qualities of love and vision will be an artist.

But you may realize the value of writing, and you may believe that you can acquire the art, and still be troubled to know how to

begin. First of all, you should realize that no two human brains ever reflect experience in exactly the same way. Your brain will view life from an angle peculiar to itself, and will get from life certain values not fully shared by anyone else. In learning to write, your first problem is to find the thoughts and experiences which belong to you more than to anyone else.

But you may ask: How can I tell which phases of my thought and experience deserve expression, and which are mere commonplace? The quickest way to answer this question is by reading. Reading will tell you which phases of experience have been commonly treated and which have been neglected. Moreover, as you read, you will be surprised to find that very often the features of your life which seem to you peculiar and interesting are exactly those that are commonly—and even cheaply—written about, while those which you have passed over as not worth attention may be aspects of life that other people too have passed over, they may therefore be fresh and well worth writing about. For instance, two writers, Joseph Conrad and John Masefield, wrote of the sea. Both had been sailors; and both utilized their experience as viewed through the media of their temperaments in ways undreamed of before. Again, Algernon Blackwood, applying psychology to the study of the supernatural, developed a field peculiar to himself. Still again, H. G. Wells, who began his career as a clerk and continued as a teacher of science, found in both these phases of his experience mines of literary wealth; and Arnold Bennett, born and educated in the dreariest, most unpicturesque, apparently least inspiring, part of England, saw in the very prosiness of the Five Towns untouched material, and has given this an enduring place in literature. In your imagination also may lie the basis of fantasies as yet unexpressed; or in your experience, aspects of life that have not as yet been adequately treated. Until recently the one phase of life most exploited in literature was the romantic love of youth; this was the basis of nearly all novels and short stories; its presence was demanded for either primary or secondary interest in the drama; and it was the chief source of inspiration for the lyric. But within the last thirty years all sorts of other subjects have been opened up. Today the writer's difficulty is, not that he is restricted by convention in his choice of material, but that he is so absolutely unrestricted that he may be in doubt where to make his choice. He is, to be sure, conditioned in two ways: To do the best work, he must keep within the bounds of his own temperament and experience; and he should as far as possible avoid phases of life already written about, unless he can present them under some new aspect.

With these conditions in mind, you are ready to ask yourself: What have I to write about? Let us put the question more concretely: Have you lived, for instance, in a little mining town in the West? Such a little town, with its saloons and automatics and flannel-shirted hero, stares at us every month from the pages of popular magazines. But perhaps your little mining town is dry, perhaps there has not been a shooting fray in it for ten years, and all the young men go to Bible class on Sunday. Well, this is new; let us have it. Is New York your home? The magazines tell us that New York is parceled out and pre-empted: the Italian quarter, the Jewish quarter, the Syrian quarter, the boarding-houses, Wall Street. And yet have you ever seen a story of just your kind of street and just the kind of people that you know? If not, here is your opportunity.

You have read about sailors, fishermen, farmers, detectives, fruit-peddlers, clothes-merchants, commercial travelers, financiers, salesmen and saleswomen, doctors, clergymen, heiresses, and men about town, but have you often read a thrilling romance of a filing clerk? How about the heroism of a telephone collector? the humors of a street-car conductor? The seeing eye will find material in the department store, in the dentist's waiting room, in college halls, on a lonely country road—anywhere and everywhere. And the seeing eye is cultivated by perpetually comparing life as it is with life as portrayed in literature and in art. In other words, to get material to write about, you must cultivate alertness to the nature and value of your own experience; but this you can never do with any degree of success unless you at the same time learn how to read.

You may say that you know how to read. Of course you do in the less exacting sense of the term. It is possible, though not very probable, that you can read, in the fullest meaning of the term, the meaning which it has in J. B. Kerfoot's delightful book, *How to Read*. If you can you are to be congratulated, for your education is complete; you have the key to all knowledge as well as to wisdom and inexhaustible pleasures. But such reading is not specifically taught in the schools; it is the fruit of thoughtful reaction to experience and careful self-training.

Perfect reading would interpret fully every idea in an article, however awkward or complicated its expression. But consider how difficult—how impossible—this is, even when the subject is not abstruse and the expression is as clear as human skill can make it. The writer cannot show you his thoughts; he can only use combinations of words which he hopes will revive in your mind past emotions, ideas, and images similar to his own thought and experience. All writing, says Mr. Kerfoot, is but the outlining of a scenario for a movie that the reader himself must stage with material from the storehouse of his own experience. Does the writer describe a farm kitchen? You read his specifications and draw out from your stored-up images whatever comes nearest to them. Does he tell you of a heroine with golden hair, hazel eyes, a piquant nose, and a rosebud mouth? You yourself must produce these items, singly or in combination; and the heroine will be, not his, but either your memory or your creation.

The main point is that reading, like writing, depends upon thought and experience, and varies with the ability of the reader to reproduce by imagination the symbols of the writer's thought. As writing is the expression of life, so reading is vicarious living—living by proxy, reliving in imagination what the author had lived before he was able to write it. Hence, we grow *up to* books, grow *into* them, and grow *out of* them. Our growth in life may be measured by the books that we read; and conversely, as we cannot have all experience in our own lives, books are necessarily one of the most fruitful sources of growth in experience.

This is true, however, only of what may be called vitalized reading —reading, not with the eyes alone, nor with the mind alone, but with the stored experiences of life, with the emotions that it has brought, with the attitudes toward men and things and ideas that it has given—in a word, with imagination. To read with imagination, you must be, in the first place, active; in the second place, sensitive and receptive. Instead, however, of being merely passively receptive of the stream of ideas and images and sensations flowing from the work you are reading, you must be alert to take all that it has to give, and to re-create this in terms of your own experience. Thus by making it a part of your imaginative experience, you widen your actual experience, you enrich your life, and you increase the flexibility and power of your mind.

In order, then, to tap the sources of your imagination, you must learn to experience in two ways: first, through life itself, not so much by seeking experiences different from those that naturally come your way, as by becoming aware of the value of those that belong naturally to your life; and second, through learning to absorb and transmute the life that is in books, beginning with those that stand nearest to your stage of development. In the process of reading you will turn more and more to those writers who have a larger mastery of life, and who, by their skill in expressing the wisdom and beauty that they have made their own, can admit you, when you are ready, to some share in that mastery. ♦

HYPNOTISM AND THE HYPNOTIST

by S. J. Van Pelt

HYPNOSIS IS THE NAME given to that peculiar psychical state in which the mind is particularly susceptible to suggestion. The word "trance" is used as synonymous with "hypnosis." The art and science of inducing this state of hypnosis or trance state is known as hypnotism. The condition may be produced by the subject without the assistance of another person, in which case it is known as *self-hypnosis*. The hypnotic state may be brought about either deliberately or, in certain circumstances, accidentally.

Although hypnotism was undoubtedly used in the "sleep temples" of Ancient Egypt, and Hippocrates, the father of modern medicine, spoke of it when he said, "The soul sees quite well with shut eyes the affections suffered by the body," it was not until 1774 that it was heard of in Europe.

Franz Anton Mesmer, a fully qualified Viennese physician, at this time reported many peculiar phenomena, now known to be hypnotic, which occurred during the treatment of patients with a magnet. He soon found that a magnet was not necessary, and that equally astounding results could be achieved by making "mesmeric passes." These are now recognized to be merely a form of suggestion, but Mesmer wrongly concluded that some personal or "animal" magnetism was involved. The hostility of his medical colleagues drove Mesmer to Paris, where his spectacular "cures" created a furor. In 1784 a commission appointed by Louis XVI, himself a great believer in the power of the royal touch, condemned Mesmer, quite unjustly, as a quack, without allowing him to demonstrate his methods personally. The French Revolution put an end to the development of "mesmerism" in that country, and it was next heard of in England.

Dr. John Elliotson, founder of University College Hospital, London, and one of the most brilliant men in the history of English medicine (he introduced the stethoscope to England and the methods of examining the heart and lungs which are used to this day), experimented with mesmerism and was forced to resign his position as a result. Nevertheless Elliotson published a quarterly journal called *Zoist* in 1843 which was devoted to mesmerism and cranial physiology. Under this influence "mesmeric" hospitals were set up in London, Edinburgh, Dublin and other large cities.

About the same time Dr. James Braid, a Manchester physician, while seeking a scientific explanation for the phenomena of mesmerism, discovered that he could induce a trancelike state by means of fixed gazing. Braid coined the word "hypnotism" and published a book, *Neurypnology or the Rationale of Nervous Sleep*, in 1843. The British Medical Association refused his offer to demonstrate his methods or read a paper on the subject. The work of Elliotson and Braid, however, bore fruit abroad.

In India, Dr. James Esdaile, a young Scottish surgeon, after reading of Elliotson's work, began to experiment with mesmerism. Although he performed over 300 major, and several thousand minor, operations quite painlessly under its influence and reduced the mortality rate from 50 percent to five percent, the medical journals in England refused to report his cases.

Braid's work was taken up in France by Dr. Liébeault, a simple country physician. He added verbal suggestion to Braid's method of fixed gazing and evolved a technique which is often used to this day. After 20 years of experiment he wrote a book, *Du Sommeil*, and, although he sold only *one* copy, this work came to the notice of the great Professor Bernheim. Bernheim established hypnotism as probably the most important form of psychotherapy when he published *Suggestive Therapeutics* in 1886.

About the same time Charcot, the great French neurologist, experimented with hypnotism and established the Salpêtrière school of thought on the subject—in opposition to the "Nancy School" of Bernheim and Liébeault. As the result of working with only three paid, grossly hysterical subjects and never hypnotizing

a patient himself, Charcot made the most colossal mistakes. For instance, believing, quite erroneously, that the subject was deaf in the hypnotic state, he would announce that a magnet would produce a certain effect. Bernheim was able to disprove the pseudoscientific nonsense expounded by Charcoat by showing that the results obtained were due to *suggestion*—not magnetic force—for the subjects could hear perfectly well, and a wooden imitation "magnet" produced effects equally astounding.

Sigmund Freud, like Mesmer a Viennese physician, became interested in hypnotism after witnessing the cure of a case of hysteria by his friend Dr. Breuer, who used this method. Freud went to France to study hypnotism under Charcot, Bernheim and Liébeault. When he discovered (as every hypnotist does) that he could not *deeply* hypnotize *all* his patients, Freud decided to give up hypnotism. Freud completely failed to realize the possibilities of *other degrees* of hypnosis and *other methods* of using it.

As psychoanalysis became more and more popular, hypnotism became more and more neglected. Nevertheless in 1919 Freud admitted that, if psychotherapy were ever to become widely available to the public, a return to hypnotism as a shortcut would be necessary. This is easily understandable when it is realized that the time required for "orthodox psychoanalysis" might be anything from *two to five years*.

Hypnosis has always come back to favor when quick methods are required, such as during and after times of great stress associated with upheavals—like the First and Second World Wars.

As prophesied by Freud, during the stress of the First World War, hypnotism returned to favor. Since then interest in the subject has continued. Much recent work has been along the line of encouraging the recall of buried memories through hypnosis and the reliving of traumatic events.

Experimenters have demonstrated the possibility of inducing an experimental conflict or artificial neurosis by means of hypnosis, for the purpose of study or treatment, and have used hypnosis to show a patient that he can control his functions.

In recent years, as the result of increasing interest in hypnotherapy, the British Society of Medical Hypnotists was formed in England in 1948, and its quarterly journal, the *British Journal of Medical Hypnotism*, first published in 1949, contains the current scientific opinions of world authorities on hypnotism.

This journal has been officially recognized and is included in *World Medical Periodicals*, published by the United Nations Educational, Scientific and Cultural Organization and the World Health Organization in 1953.

In 1949 increasing interest in the medical and other scientific aspects of hypnotism by workers in this field in the United States of America led to the establishment of the Society for Clinical and Experimental Hypnosis (New York). This society published the first issue of its quarterly journal—the *Journal of Clinical and Experimental Hypnosis*—in 1953.

In 1950 the British Society of Medical Hypnotists approached the Minister of Health for Great Britain with the object of introducing legislation to ban stage hypnotism, and in 1952 it was able to lend material assistance to Dr. Somerville Hastings, M. P., who successfully piloted his Private Member's Bill through Parliament. This Bill, which controls stage performances of hypnotism, was passed in 1952, and the Act came into force in April 1953. It constitutes an important step in the long, long struggle to establish hypnotism in its right place as a scientific medical, therapeutic procedure and free it from the aura of supernatural humbug and quackery which has surrounded the subject for so long. It is a curious fact that, in spite of the vast amount of clinical and experimental work recorded in a voluminous scientific literature, the real nature of the trance state called hypnosis is not known for certain.

By reason of the facts that the state of hypnosis may be, and frequently is, induced by the suggestion of "sleep," and that hypnotized persons are often observed with closed eyes, which give the impression of sleep, the totally erroneous belief has become widespread both among lay people and medical men that hypnosis and sleep are identical.

Quite apart from the simple fact that hypnosis can be induced *without any mention of sleep at all*, and that hypnotized persons may open their eyes and be mentally alert, while any semblance to normal sleep can be instantly dispelled by suggestion, much scientific work has served to establish the following important points of difference between ordinary sleep and hypnosis:

1. A person who is normally asleep will not respond to stimuli in the way that a hypnotized subject will do. For instance, even a whispered suggestion, which a sleeping person would ignore entirely, would be quite sufficient to bring about a most complicated course of action if given during hypnosis.

2. Consciousness, which is entirely suspended in natural sleep (and partially in dreaming), is present in the state of hypnosis.

3. The patellar reflex, or knee-jerk, which is normally abolished in sleep, is exactly the same in hypnosis as in the waking state.

4. The normal difference between heart and lung action in sleep and the waking state does not exist in hypnosis, and the trance state is more like normal consciousness than sleep.

5. Brain potentials of subjects in a hypnotic trance are characteristic of those obtained in the waking state.

For *practical* purposes it is best to regard hypnosis as a peculiar psychical state in which the mind is particularly susceptible to suggestion. Even in the waking state it is well known that suggestion can be very powerful, and often a single word or phrase can make a person feel happy, sad, angry or afraid and evoke all the bodily symptoms which accompany these feelings. In hypnosis it is well known that the power of suggestion is greatly increased.

In the ordinary waking state the mind is occupied with a thousand and one different impressions. In hypnosis, however, the mind is *concentrated*. One hundred-percent concentration will represent very deep hypnosis, in which the subject will be paying attention to the hypnotist only. The patient in this state can disregard, or be completely oblivious to, other things—even physical pain—for the whole "mind power" is concentrated on the hypnotist's suggestions, and there is literally nothing left to take notice of other stimuli.

Contrary to the general belief of those who are unfamiliar with the scientific literature on the subject, that only those who are "weak-willed" or neurotic may be hypnotized, all the available evidence points to the fact that *hypnotizability may be considered as an almost universal and normal attribute of the human race*, irrespective of color, creed or sex. It should be remembered, of course, that there are different *degrees* or *stages* of hypnosis (as with anesthesia), and, while there can be no clear-cut division between them, the following stages are generally accepted for practical purposes, together with estimated percentages of people who can achieve them:

1. Uninfluenced ..... 5 percent
2. Hypnoidal ..... 10 percent
3. Light trance ..... 25 percent
4. Medium trance ..... 35 percent
5. Somnambulistic (deep) trance ..... 25 percent

Although to all intents and purposes some 90-95 percent of all people can be hypnotized to one degree or another, it is usually possible to pick out "good subjects" by means of simple *suggest-*

ibility tests. In the *postural sway test* the subject falls backward in response to suggestions to this effect. The hand becomes light and floats in the air in the *hand levitation test* as the result of suggestion. In the *handclasp test* the hands become "locked" together, and in the *pendulum test* a suspended ring will swing in the direction the eyes travel around a circle as the result of suggestions to this effect. Another simple test is to ask the subject to close his eyes tightly and imagine they are stuck together. If 20 or so people are challenged in a group in this way, it is almost certain that four or five will be unable to open their eyes.

People who react positively to these tests usually make very good subjects, for they have the ability to use their imagination. Stage hypnotists invariably make use of these or similar suggestibility tests in order to pick out "easy" subjects for their demonstrations.

These facts demonstrate quite clearly that any "power" which exists *lies within the subject*, and that the hypnotist, contrary to general belief, has no "mysterious gift" or "hypnotic power" whatsoever. The force used is the *subject's own imagination*, and the hypnotist merely has the technical knowledge of how to use it to the best advantage. Essentially hypnotism may be described as a *manipulation of the subject's imagination*.

The imagination is far stronger than the will power, and in any contest between the two the imagination will always win. For instance, anybody can walk along a plank of wood placed on the ground. If, however, it is raised a few feet between supports, few people can do it, because they think (or imagine) that they would become giddy and fall. While they are in this state of mind all the will power in the world cannot help them or stop them from falling.

As the result of this fact, we find that the best hypnotic subjects are ordinary, normal people. The more intelligent and imaginative they are, the better. Children usually make excellent subjects, as their power of imagination is well known. Young people between the ages of 18 and 26 are usually better than older people, as they are not so set in their ways. Nervous and scatterbrained people are usually difficult because their minds are filled with their own peculiar thoughts or ideas, and they have difficulty in concentrating and imagining what is suggested.

There is no difference between the sexes in their reaction to hypnosis, and the so-called hardheaded Northern races are just as easily influenced on the whole as the more volatile Southern ones. Sceptical people are often easy subjects because their scepticism is only a cloak, as secretly they believe in hypnosis while openly expressing doubt to bolster up their morale. When it comes to the test, imagination invariably wins, and such people easily succumb. On the other hand, many people who openly profess an ardent desire for hypnotism secretly believe that to yield would show that they were weak-minded, and so they subconsciously resist.

Finally the subject is unlikely to achieve hypnosis unless there is a *real motive* to do so. For instance, a man who really desires to give up alcohol for one reason or another can easily be helped. If, however, he is forced to seek treatment by his wife or relatives, and secretly has no desire to stop drinking, then hypnosis will most likely be very difficult, if not impossible, to achieve.

It is important to remember that there are *degrees* of hypnosis, for in the light and medium stages the subject will probably remember all the events of the trance and *may even doubt that he was really hypnotized at all*, because he was fully conscious of what went on and could hear the operator making suggestions. Nevertheless, these suggestions may have the most powerful effects. The importance of this cannot be overstressed, for *the subject may be influenced by suggestion without appreciating the fact that he has been in any state of hypnosis at all*. In the deep or somnambulistic stage, of course, the events of the trance are often forgotten—especially if amnesia is deliberately suggested. As a result the subject *imagines* he did not know what he was doing, simply because he has *forgotten* what occurred.

A common, but completely erroneous belief, is that the deeper the trance, the better the result, on the naive assumption that, if one dose of medicine does good, a double dose will do better! Those with *practical* experience of hypnotic suggestion soon realize that *response to suggestion does not necessarily depend upon depth of trance*, and that a great deal of useful work can be carried out medically, using only light-to-medium hypnosis.

Hypersuggestibility is undoubtedly the most characteristic phenomenon of the trance and certainly one of the most useful from the practical point of view. Although its degree may vary from subject to subject and according to the depth of trance and other circumstances, hypersuggestibility is present in even the lightest stages of hypnosis.

The subject is by no means helpless, however, for he can think, reason and even ignore commands, but it is customary for suggestions *with which he is fundamentally in agreement* to be accepted and acted upon far more readily than they would be in the ordinary waking state.

The subject, however, has several defences against suggestions *he does not wish to accept*, and, should they or the situation become really intolerable, he can escape by either simply refusing to obey, waking up or going into ordinary sleep. Any suggestion which really threatens his security can arouse such an emotional disturbance that the concentration of mind induced by the hypnotist is destroyed and the trance broken. This explains why subjects will sometimes commit apparent "crimes," such as "stabbing" a person with a paper dagger or "shooting" someone with a toy pistol when they know perfectly well it is only the subject of an experiment, and that they can trust the hypnotist not to get them into real trouble.

When the subject's mind is concentrated on the hypnotist, he is not likely to take much notice of others. It is very much like the case of a person who is so deeply absorbed in some task that he fails to take notice of what people are doing or saying. Nevertheless he would react to anything really important, the more especially if it were dangerous and threatened his security.

Alteration in muscle tone, paralysis, catalepsy and automatic movements can all be brought about by suggestion in hypnosis. Any voluntary muscular activity can be increased, decreased or inhibited. The whole body can be made rigid and stretched between two supports, where it will support the weight of the hypnotist. The paralysis never follows the real distribution of the nerves but is always, as in the case of the hysterics, based upon the subject's idea of what should be paralyzed. Even hysterical gaits and convulsive seizures may be produced by suggestion.

In cases where the muscular strength is apparently enormously increased, there is actually no real increase. Electroconvulsant therapy has shown that the enormous latent strength in human muscles can even fracture bones during convulsions. Under ordinary conditions a reserve is imposed, with the result that the total strength is seldom used, except in emergency.

Probably the most impressive and useful phenomenon is analgesia or anesthesia. Full concentration on the idea of anesthesia leaves no "mind power" over to take notice of painful stimuli. This principle explains why wounded soldiers, for instance, have been able to carry on in the excitement of battle without noticing even severe wounds. In everyday life people often notice cuts or abrasions and wonder where and how they got them. All kinds of paraesthesias such as numbness, tingling, itching, prickling

and burning are easily induced.

Hallucinations of the special senses, such as vision, hearing, taste and smell, can easily be produced. When told, for instance, that it is a pleasant perfume, the patient will be quite undisturbed by the fumes of ammonia held under his nose. Nonexistent things can be "seen," "heard," "felt," "tasted" or "smelled" if suggested by the hypnotist, or real sensory impressions ignored if the patient is ordered to do so. In the deep somnambulistic state, the eyes may be opened, and both positive and negative visual hallucinations induced.

Age regression is another interesting phenomenon which is easily obtainable under hypnosis, and of which considerable use can be made for the purpose of analysis. The subject in a deep trance can be regressed back to any definitely specified period in early age. For instance, an adult person may be told he is only 6 years old, when he will act as though he is that age and remember vividly events which occurred then. Handwriting tests (the handwriting changes to the infantile or childish type) and intelligence tests all support the belief that the regression is genuine.

Even in the ordinary waking state it is well known that thoughts and ideas can cause bodily changes. For instance thoughts that cause shame can upset the circulation and cause blushing. Thoughts of appetizing food can set the salivary glands working. Certain emotional thoughts may bring tears to the eyes, while thoughts which inspire fear may cause the heart to palpitate or the stomach to "turn over." In hypnosis all these effects and many others can be controlled and so diminished or intensified. A bewildering variety of spectacular changes is reported in the scientific literature. There is practically no organ or gland the activity of which has not been reported as having been influenced by hypnotic suggestion.

A suggestion given during the hypnotic trance will be carried out later on during the waking state of ordinary normal life exactly as specified by the hypnotist.

Any phenomenon which may be induced during the hypnotic state can be reproduced in normal life by means of the post-hypnotic suggestion. The suggestion will be carried out with remarkable accuracy *providing it does not conflict with the subject's deeply rooted moral principles*. In general the posthypnotic suggestion is more likely to be carried out after a deep trance, but in some cases it will be successful even after a light stage of hypnosis. Reasonable suggestions which are in keeping with the subject's outlook on life are more likely to be carried out than those that are ridiculous or opposed to the subject's desires. There is a compulsive nature about the posthypnotic suggestion, and, although the subject may be able to resist it, he will feel vaguely unhappy about it until it has been carried out. Sometimes even unreasonable suggestions will be carried out because the struggle to resist gives rise to psychosomatic phenomena and anxiety of such intensity that the subject is forced to give in.

The subject always feels relief when the suggestion has been carried out and, in cases where the action appears to be foolish, will often rationalize to explain the apparently absurd behavior.

The posthypnotic suggestion is useful for therapeutic purposes and also to make each succeeding hypnotic session easier. A trained subject will fall into a hypnotic trance at any prearranged signal, thus giving not only quick but instantaneous hypnosis.

Loss of memory for events in the trance is quite common after deep hypnosis, especially if the patient has been ordered to forget. All the events of the trance can always be recalled with ease in any subsequent state of hypnosis. Further, even an apparently complete amnesia can often be broken down by persistent questioning, even in the waking state. It was Freud's observation of Bernheim's experiments in this direction which led to the development of psychoanalysis.

Since the induction of hypnosis depends upon utilizing the *imagination* of the subject, any means which can influence this imagination is capable of inducing hypnosis. There are probably as many different methods of inducing hypnosis as there are hypnotists, but even in methods where it is not immediately apparent that the hypnotist is calling for concentration, careful examination will reveal that ultimately the subject's mind is focused on the suggestions of the operator. One of the best-known methods is that in which the subject is requested to fix his gaze on some bright object or even the operator's eyes.

Having captured his attention in this simple, if somewhat dramatic fashion, the hypnotist proceeds to suggest that the subject's eyes are getting tired and desire to close. Eventually they would be forced to close from actual fatigue, but usually the "feelings" which arise as the result of the suggestions bring about closure of the lids much sooner than would normally occur from muscular exhaustion. Once the lids have closed, the hypnotist proceeds to suggest that the subject is feeling "tired and heavy," "calm and relaxed" or even "sleepy." As the "feelings" suggested by the hypnotist make themselves felt, the subject pays more and more attention to the operator and cares less and less for anything else. The skill of the hypnotist lies in manipulating the subject's imagination and persuading him to believe things that he suggests. Every successful suggestion increases the prestige of the hypnotist and persuades the subject that he is indeed being "put under the influence."

Again, ordinary sleep may occasionally be changed into hypnosis simply by talking to the subject, and in certain cases rapport may be established with the operator.

An intravenous injection of pentothal, evipan or some drug may be used to overcome the resistance of a refractory patient, the object being to render the subject drowsy and suggestible without his going to sleep.

It is possible in subjects capable of deep hypnotic states to produce obsessive ideas, compulsions, phobias, ideas of reference, persecutory trends, grandiose ideas, depressive and nihilistic delusions, ideas of unreality, hypochondriacal ideas and delusions of influence, and *these mental disorders resemble very closely those found in the actual neuroses and psychoses*.

We must consider now what may be termed unorthodox methods of inducing hypnosis. Careful study will reveal that hypnosis is often involved in so-called "faith healing," "spirit healing" and unorthodox "cures" of all descriptions. It is *seldom recognized* by either the patients, practitioners or untrained observers as such, because the popular conception of hypnosis is so naive that anything short of an obvious state of trance passes unrecognized.

Nevertheless all the ingredients are there. The subject is always *emotionally aroused*. Emotion *concentrates* the mind into a condition of hypnosis. The *idea or suggestion of cure* is implanted, and, if the *imagination* is sufficiently affected, the desired results may follow.

Such "cures" resemble the *old-fashioned method* of using hypnosis to dispel *symptoms only* by *direct suggestion*. They are seldom lasting because the root cause has not been discovered and treated. Even in so-called orthodox medicine the placebo in the shape of the humble bottle of colored water acts by what might be called modified hypnotic suggestion.

All of these methods, disguised and unrecognized as they often are as being hypnotic in nature, nevertheless occasionally produce remarkable results. It is essential to bear in mind that the *apparent miracles, however, can easily be explained on the basis of the phenomena obtainable as the result of hypnotic suggestion.* ♦

RUMORS . . . and how they spread

RUMOR IS THE MOST PRIMITIVE WAY of spreading stories—by passing them on from mouth to mouth. It is just as inefficient, inaccurate, and unaccountable as it is primitive.

Civilized countries in normal times have better sources of news than rumor. They have the radio, television and the newspapers. But in times of stress and confusion rumor emerges and becomes rife, still further increasing the confusion. At such times you may find different kinds of news in competition: the press, television and radio *vs.* the grapevine.

Especially do rumors spread when war requires secrecy on many important matters. Then the press, television and radio are censored. The customary sources of news no longer give out enough information. Since the people cannot learn through legitimate channels all that they would like to learn or are anxious to learn, they pick up "news" wherever they can get it and when this happens, rumor thrives.

It thrives everywhere. Military leaders have to guard against rumor, because it disrupts carefully prepared plans and may even lead to panic and defeat.

Rumors are repeated even by those who do not believe the tales. There is a fascination about them. The reason is that the cleverly designed rumor gives expression to something deep in the hearts of the victims—the fears, suspicions, forbidden hopes, or daydreams which they hesitate to voice directly.

Pessimistic rumors about defeat and disaster show that the people who repeat them are worried and anxious. Optimistic rumors about record production or peace soon coming point to complacency or confidence—and often to overconfidence.

A rumor travels far, and grows as it moves when people want to believe it, or when they get some satisfaction out of hearing and telling it. You are glad to repeat the story that verifies your suspicions, voices your own alarms, amuses you by giving you a laugh at the expense of someone you don't like any too well.

So it might almost be said that it is public opinion which originates rumors, that the hardy rumors are those that fit in with the suspicions and fears everyone is sharing with everyone else. But rumors may also create public opinion.

An alarming rumor will rouse or increase the fears that serve to push the rumor on. Thus rumors grow from rumors. And fears from fears. Everyone has seen the way this works. There is cheering. One man cheers. Three more join him. Then there are four cheering men, and that gets a dozen cheering, and then fifty.

Psychologists are able, with modern polling methods like those used to predict elections, to watch rumors spread from place to place and even to measure the speed with which they travel. When a rumor starts in New York, interviewers in Boston, Chicago, New Orleans, Miami, Seattle, and other cities all over the country can be notified to listen for that rumor. As it is picked up, the channels through which it spreads may be revealed.

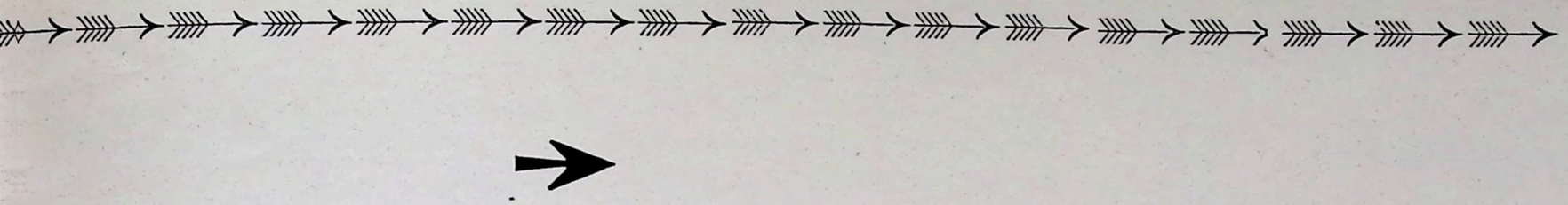
A rumor is not always a lie, not always a malicious story. The grapevine is sometimes the only way certain facts are circulated.

Because people grow to like and have pride in their own stories and resent any doubts, their answers to doubters become more positive or more detailed, increasing the plausibility of the rumor. At this stage the rumor is generally attributed to an "authoritative source." But although rumors sometimes contain fact or are based on fact, they can never be relied upon. Often they are entirely fictitious and are deliberately started.

These are the ways in which rumor is used in the war of words: (1) *For disruption.* Rumor can be made to play havoc with morale. (2) *As a smoke screen.* Rumor can hide the truth. (3) *For discrediting news sources.* This is a special technique. (4) *As bait.* Rumor may be used to learn the truth.

Rumors differ according to whether desire or fear or hate gives them force. Here are these three most common kinds: (1) *The pipe-dream rumor* depends on wishful thinking. "There's nothing either good or bad, but thinking makes it so." There is pleasure in believing and repeating what you hope is true. (2) *The bogey rumor* is the opposite of the pipe-dream. It expresses a fear, not a wish. (3) *The wedge-driving rumor*, perhaps the most dangerous of all, is the rumor that attempts to create hostility and distrust between allies, or between particular groups within a country. It, too, depends on an emotion, hostility. People repeat it because they dislike a nation or a group.

Some rumors appear freely in the press, television and radio. They are frankly reported as rumors and usually do little harm.



They do not get exaggerated by repetition. Others are covert and secret, being repeated *sub rosa* and often growing to fantastic proportions. These are dangerous. The teller, having no responsibility, is free to let his wishes, fears, and hostilities work.

Most rumors can be accepted passively. They are insidious but work only slowly to undermine confidence. Other rumors, however, incite action. They are the panic rumors. With them the danger is real, palpable, and immediate, for the listener tends to do something about them suddenly and violently. He packs a few of his most cherished possessions in a wheelbarrow, collects his family, and starts trudging out of town. Then he himself becomes a rumor, and the rumor becomes a fact, for people see him going and decide to go too. Presently the procession along the road is the most potent rumor of all, a visual symbol that needs no words. Everyone seeks to join it. Panic is on.

Rumors thrive on fertile soil. What soil is fertile? A community, a city, or an army moved by common emotions is fertile soil. And war is a circumstance that produces this state. Then men share the hope of victory, the fear of defeat, and hostility against both the enemy and all others who threaten them with failure. A rumor that gives expression to these emotions is easy to tell, easy to hear.

Lack of information about important things favors rumor. People demand information about what concerns them most. The greater their concern, the more information they require. When news is scarce and interest high, newspapers have to string out their accounts of trivial events in order to satisfy the public appetite. Then it is that rumor spreads easily. People want news, and they lack the factual information that would contradict and stop a false rumor.

Rumor is encouraged by *discontent*, *frustration*, *boredom and idleness*. That is why rumor spreads so easily in small communities. People really need to be active, and idleness puts them under tension. Gossip and rumor provide release for this tension —a certain amount of release, although it is not very satisfying.

Expectation fosters rumor. People are eager for news. If no one feeds them facts, they will take half-facts as better than nothing. People readily believe what previous events or experiences have prepared them to believe; they discount stories contrary to what they expect.

Rumors persist because the human needs, the fears and hopes and hatred that the rumor satisfies, are very much the same from generation to generation.

Other reasons why rumors become perennials, cropping up year after year, are because they are timely, natural, easy to remember, easy to repeat, plausible but not too plausible to be impressive and unverifiable.

To survive for posterity, rumor, like other more reputable forms of literature, must have qualities that command attention. It must have punch, it must be striking, with maybe a wry and unexpected twist. It is helped tremendously by humor, for everyone notices, remembers, and repeats a good story.

What kind of a person spreads rumors? Does everybody spread them? If not, who does?

Everybody likes to repeat a story, a humorous story, a story which is apt and catchy or is remarkable because it makes a huge unexpected assertion. Many people repeat such stories without believing them, expressing disbelief or laughing them off. That is a fairly healthy kind of rumormongering.

But there are, nevertheless, differences among people in the credence that they give to unverifiable rumors, in the readiness with which they repeat them. Psychologists do not have the complete answer to this question, but there is good evidence that the most persistent rumormongers are persons who feel emotionally insecure, who are not well adjusted to life. Such persons fear and hate most readily, trying to offset their fears with hopes; and fear, hate, and hope are the ingredients of the soil in which rumors thrive.

It is also true that these less secure people lack and need prestige. Repeating a rumor gives prestige to the repeater. News always seems to be the property of the teller. Potentates used to kill the bearers of bad news, as if the messengers were responsible for this news. Everyone knows what fun it is to be the person to spring a surprise or to tell a great secret. Some people are never the center of attention except when telling a secret—perhaps a secret that isn't true. ♦

HOW TO DETECT PROPAGANDA

WE ARE FOOLED BY PROPAGANDA chiefly because we don't recognize it when we see it. It may be fun to be fooled but, as the cigarette ads used to say, it is more fun to know. We can more easily recognize propaganda when we see it if we are familiar with the seven common propaganda devices. These are:

1. *The Name Calling Device*
2. *The Glittering Generalities Device*
3. *The Transfer Device*
4. *The Testimonial Device*
5. *The Plain Folks Device*
6. *The Card Stacking Device*
7. *The Band Wagon Device*

Why are we fooled by these devices? Because they appeal to our emotions rather than to our reason. They make us believe and do something we would not believe or do if we thought about it calmly, dispassionately. In examining these devices, note that they work most effectively at those times when we are too lazy to think for ourselves; also, they tie into emotions which sway us to be "for" or "against" nations, races, religions, ideals, economic and political policies and practices, and so on through automobiles, cigarettes, radios, toothpastes, presidents, and wars. With our emotions stirred, it may be fun to be fooled by these propaganda devices, but it is more fun and infinitely more to our own interests to know how they work.

Lincoln must have had in mind citizens who could balance their emotions with intelligence when he made his remark: ". . . but you can't fool all of the people all of the time."

Name Calling is a device to make us form a judgment without examining the evidence on which it should be based. Here the propagandist appeals to our hate and fear. He does this by giving "bad names" to those individuals, groups, nations, races, policies, practices, beliefs, and ideals which he would have us condemn and reject. For centuries the name "heretic" was bad. Thousands were oppressed, tortured, or put to death as heretics. Anybody who dissented from popular or group belief or practice was in danger of being called a heretic. In the light of today's knowledge, some heresies were bad and some were good. Many of the pioneers of modern science were called heretics; witness the cases of Copernicus, Galileo, Bruno.

Use of "bad names" without presentation of their essential meaning, without all their pertinent implications, comprises perhaps the most common of all propaganda devices. Those who want to *maintain* the status quo apply bad names to those who would change it. Those who want to *change* the status quo apply bad names to those who would maintain it.

Glittering Generalities is a device by which the propagandist identifies his program with virtue by use of "virtue words." Here he appeals to our emotions of love, generosity, and brotherhood. He uses words like truth, freedom, honor, liberty, social justice, public service, the right to work, loyalty, progress, democracy, the American way, Constitution defender. These words suggest shining ideals. All persons of good will believe in these ideals. Hence the propagandist, by identifying his individual group, nation, race, policy, practice, or belief with such ideals, seeks to win us to his cause. As *Name Calling* is a device to make us form a judgment to *reject and condemn*, without examining the evidence, *Glittering Generalities* is a device to make us *accept and approve*, without examining the evidence.

For example, use of the phrases, "the right to work" and "social justice" may be a device to make us accept programs for meeting the labor-capital problem which, if we examined them critically, we would not accept at all.

In the *Name Calling* and *Glittering Generalities* devices, words are used to stir up our emotions and to befog our thinking. In one device "bad words" are used to make us mad; in the other "good words" are used to make us glad.

The propagandist is most effective in use of these devices when his words make us create devils to fight or gods to adore. By his use of the "bad words," we personify as a "devil" some nation, race, group, individual, policy, practice, or ideal; we are made fighting mad to destroy it. By use of "good words," we personify as a god-like idol some nation, race, group, etc. Words which are "bad" to some are "good" to others, or may be made so. Thus, to some the New Deal is "a prophecy of social salvation" while to others it is "an omen of social disaster."

From consideration of names, "bad" and "good," we pass to institutions and symbols, also "bad" and "good."

Transfer is a device by which the propagandist carries over the authority, sanction, and prestige of something we respect and revere to something he would have us accept. For example, most of us respect and revere our church and our nation. If the propagandist succeeds in getting church or nation to approve a campaign in behalf of some program, he thereby transfers its authority, sanction, and prestige to that program. Thus we may accept something which otherwise we might reject.

In the *Transfer* device symbols are constantly used. The cross represents the Christian Church. The flag represents the nation. Cartoons like Uncle Sam represent a consensus of public opinion. Those symbols stir emotions. At their very sight, with the speed of light, is aroused the whole complex of feelings we have with respect to church or nation. A cartoonist by having Uncle Sam disapprove a budget for unemployment relief would have us feel that the whole United States disapproves relief costs. By drawing an Uncle Sam who approves the same budget, the cartoonist would have us feel that the American people approve it. Thus, the *Transfer* device is used both for and against causes and ideas.

The *Testimonial* is a device to make us accept anything from a patent medicine or a cigarette to a program of national policy. In this device the propagandist makes use of testimonials. This device works in reverse also; counter-testimonials may be employed. Seldom are these used against commercial products like patent medicines and cigarettes, but they are constantly employed in social, economic, and political issues.

Plain Folks is a device used by politicians, labor leaders, business men, and even by ministers and educators to win our confidence by appearing to be people like ourselves—"just plain folks among the neighbors." In election years especially do candidates show their devotion to little children and the common, homey things of life. They have front porch campaigns. For the newspaper men

they raid the kitchen cupboard, finding there some of the good wife's apple pie. They go to country picnics; they attend service at the old frame church; they pitch hay and go fishing; they show their belief in home and mother. In short, they would win our votes by showing that they're just as common as the rest of us—"just plain folks,"—and, therefore, wise and good. Business men often are "plain folks" with the factory hands. Even distillers use the device. "It's our family's whiskey, neighbor; and neighbor, it's your price."

Card Stacking is a device in which the propagandist employs all the arts of deception to win our support for himself, his group, nation, race, policy, practice, belief or ideal. He stacks the cards against the truth. He uses under-emphasis and over-emphasis to dodge issues and evade facts. He resorts to lies, censorship, and distortion. He omits facts. He offers false testimony. He creates a smoke screen of clamor by raising a new issue when he wants an embarrassing matter forgotten. He draws a red herring across the trail to confuse and divert those in quest of facts he does not want revealed. He makes the unreal appear real and the real appear unreal. He lets half-truth masquerade as truth. By the *Card Stacking* device, a mediocre candidate, through the "build-up," is made to appear an intellectual titan; an ordinary prize fighter a probable world champion; a worthless patent medicine a beneficent cure. *Card Stacking* employs sham, hypocrisy, effrontery.

The *Band Wagon* is a device to make us follow the crowd, to accept the propagandist's program en masse. Here his theme is: "Everybody's doing it." His techniques range from those of medicine show to dramatic spectacle. He hires a hall, fills a great stadium, marches a million men in parade. He employs symbols, colors, music, movement, all the dramatic arts. He appeals to the desire, common to most of us, to "follow the crowd." Because he wants us to "follow the crowd" in masses, he directs his appeal to groups held together by common ties of nationality, religion, race, environment, sex, vocation. Thus propagandists campaigning for or against a program will appeal to us as Catholics, Protestants, or Jews; as members of the Nordic race or as Negroes; as farmers or as school teachers; as housewives or as miners. All the artifices of flattery are used to harness the fears and hatreds, prejudices, and biases, convictions and ideals common to the group; thus emotion is made to push and pull the group on to the *Band Wagon*. In newspaper articles and in the spoken word this device is also found. "Don't throw your vote away. Vote for our candidate. He's sure to win." Nearly every candidate wins in every election—before the votes are in.

Observe that in all these devices our emotion is the stuff with which propagandists work. Without it they are helpless; with it, harnessing it to their purposes, they can make us glow with pride or burn with hatred, they can make us zealots in behalf of the program they espouse. . . . Propaganda as generally understood is expression of opinion or action by individuals or groups with reference to predetermined ends. Without the appeal to our emotion—to our fears and to our courage, to our selfishness and unselfishness, to our loves and to our hates—propagandists would influence few opinions and few actions.

To say this is not to condemn emotion, an essential part of life, or to assert that all predetermined ends of propagandists are "bad." What we mean is that the intelligent citizen does not want propagandists to utilize his emotions, even to the attainment of "good" ends, without knowing what is going on. He does not want to be "used" in the attainment of ends he may later consider "bad." He does not want to be gullible. He does not want to be fooled. He does not want to be duped, even in a "good" cause. He wants to know the facts and among these is included the fact of the utilization of his emotions. ♦

Journalist Quentin Reynolds has won distinction in the field of news reporting.

LITERATURE UNDER PRESSURE

REPORTING

by Louis L. Snyder & Richard B. Morris

MATTHEW ARNOLD ONCE OBSERVED that "journalism is literature in a hurry." Reporting, the very marrow of journalism, may well be considered literature in an even greater hurry. In most cases, the greatest examples of reporting were written under pressure, and yet they have managed to catch that added dimension of history.

The first and most obvious difference between reporting and other types of chronicling is the difference of pace. The reporter must have the ability to produce a rapid-fire story under conditions hardly ideal for creative writing. And to keep doing so. He must carry the burden of unrelenting and monotonous regularity, intensified by the pressure of meeting a deadline. His perceptive powers must be keyed to the fast and exciting pace he has to maintain.

Charles Dickens fondly recalled his youthful newspaper experiences when he was forced to write his stories on the palm of his hand, "by the light of a dark lantern, in a post chaise and four, galloping through a wild country, and through the dead of the night, at the then surprising rate of fifteen miles an hour!" He confessed to having been upset "in almost every description of vehicle known in this country" and bemired on roads many miles from London, stranded in the company of exhausted horses and drunken postboys, with only one idea—meeting his paper's deadline. With a saddle for a seat and his knee for a desk, William Howard Russell, war correspondent of the London *Times*, wrote his story of the charge of the Light Brigade at Balaklava until the candle he used for a light "disappeared in the bottle like a stage demon through a trapdoor."

The change from horse-and-buggy and courier dispatch to jet planes and video has merely stepped up the reportorial pace. While the pressure has not been lifted, its degree varies with the kind of deadline the reporter has to meet. Newsmen for daily papers have to make hair-trigger literary decisions. Reporters for news weeklies or monthlies have time for greater reflection and more polished writing, but, with much of the pressure lifted, their reporting often lacks that impact of immediacy which is carried by top-flight newspaper stories. With the deadline postponed, the reporter has the opportunity to re-create his news event in time perspective, making his selection of essential facts on the basis of occurrences subsequent to the events he narrates. Around this point the reporter ceases to be a newsman and assumes the mantle of Clio.

There is no simple formula for the reporter who must work under pressure and yet produce a story with staying power. But there are certain essentials it would be disastrous to ignore. To begin with, great reporting must reveal perception, disclose its creator to be the possessor of "the seeing eye and the hearing ear," capable of discerning the deeper implications in the chance event he has witnessed. Vespucci had this perception when he recognized that what he looked upon was a New World, a fact that Columbus died without ever realizing. Schumann had this kind of perception when he hailed Chopin's piano variations on "*Là ci darem*" (which had been coolly received by the critics) with the words, "Hats off, gentlemen, a genius!" Such reportorial perception distinguishes a great novelist like Charles Dickens, who was also a great newspaper reporter. Dickens could discern the bizarre, the humorous, and the tragic in situations that to others seemed commonplace and dull.

Like the scientist-explorer, the critic of the arts, and the novelist, the great reporter must be able to see what is significant and distinctive about the event he is covering. Charles A. Dana demonstrated this kind of perception when he recognized that the June Days of 1848 in Paris were no mere demonstration of class anarchy, but rather the "fanaticism of an idea" galvanized by hunger. When Rebecca West attended the Nuremberg trials she observed that there emanated from the twenty-one Nazi defendants "a smell of corruption." Few are likely to forget her portrait of the banker Schacht in the dock, "A corpse frozen by *rigor mortis* into an attitude which would make it difficult to fit him into his coffin."

The general public, conditioned by the Hollywood stereotype, conceives of the reporter as combining the most acute detective talents of a Sherlock Holmes and the swashbuckling qualities of a D'Artagnan. It is, perhaps, significant that both of these gentlemen were fictional characters. The average reporter, assigned to the humdrum, tedious routine of news gathering, bears little resemblance to these glamorous personages. Nevertheless, although the conventional portrait is highly colored, the mythology has some basis in fact.

Great reporting is the product of what H. G. Wells has happily termed "an interrogative state of mind." The reporter must be constantly on the alert to question, to challenge, to probe. His acute powers of observation must be implemented by that *x* factor—the detective instinct. The *World* reporter who ripped a button off the trousers of Russell Sage's would-be assassin, leading to the culprit's arrest, possessed it. So did Daniel J. Kirwin, the star reporter of the old *Herald* staff. Assigned to cover the murder of the banker John Hawkins, Kirwin found blood on the floor covering, indicating that the corpse had been moved, noted that the banker's bloodstained hat had been hung upon the rack, obviously after the crime, and checked the movements of the victim's nephew, ascertaining that he had been absent from the Union Square Theater for forty-five minutes—time enough to commit the crime. Under the third degree, the nephew broke down and confessed.

This detective instinct has led newsmen into strange situations. Julius Chambers, famous for his stunts as a reporter on the staffs of the *Herald* and the old *World*, heard murder done over the telephone through a chance open wire, a connection that occurred only when the temperature went down to zero. Pursuing this lead, he spent months following abandoned wires, only to discover, when he located the murderer, who had killed his rival for a girl's affections, that evidence heard over the telephone was not admissible in a court of law. When the headless, armless, legless torso of a man was found in the East River, wrapped in oilcloth, Hearst's *Journal* staff went to work to solve the "Guldensuppe mystery." Other dismembered segments of the corpse turned up, each wrapped in a piece of the same oilcloth. From color prints made of this oilcloth pattern thirty members of the *Journal* staff scoured the city and eventually ran down the purchaser. As a result, a former mistress of the victim and her new lover were convicted.

Few newspapermen better exemplified that "interrogative state of mind" than a former managing editor of *The New York Times*, the encyclopedic Carr Van Anda. An accomplished Egyptologist, he set to work to decipher the hieroglyphics on the interior of Tutankhamen's tomb from a news photo. He did not rest until he had exposed certain forgeries on the inscribed slab and deduced from them that Horam-heb had murdered King Tut—not an exceptional incident even in those days. Equally master of Einsteinian physics and National League batting averages, Van Anda had the curiosity and acuteness of eye which stamped him the exceptional newspaperman. A more recent example: when the late S. Burton Heath, crack *World Telegram* reporter, read a transcript of testimony given by a Federal judge in the surrogate's audit of the accounts of his deceased business partner, his eye noted certain suspicious items. By running these clues down, Heath forced Martin T. Manton, the presiding judge of the United States Circuit Court of Appeals, to resign from the bench. Subsequently that dignitary was sent to the Federal penitentiary.

The reporter must be prepared to take risks, to stay at his post of danger, and at times to operate on his last reserves of adrenalin. Reporters, notably war correspondents, have found that they have chosen perilous careers. Rudyard Kipling, whose admiration for the courage and stamina of the war correspondent was matched by his contempt for the armchair strategist, summed

up the qualities needed for that vocation: "The power of glib speech that neither man nor woman can resist when a meal or a bed is in question, the eye of a horse coper, the skill of a cook, the constitution of a bullock, the digestion of an ostrich, and an infinite adaptability to all circumstances. But many die before they attain to this degree." To send home dispatches, men have risked jungle fever, Minié bullets, perils of the sea and air, and exposure to atomic explosions.

Carried at the masthead of *Niles' Weekly Register*, the great American news magazine of the early nineteenth century, was this appropriate quotation from Shakespeare's *Henry VIII:*

I wish no other herald,
No other speaker of my living actions,
To keep mine honor from corruption,
But such an honest chronicler.

In praising the honest chronicler Shakespeare was paying tribute to the kind of reporting that is fair, accurate, and complete, disciplined by the reporter's own conscience and his awareness of the fact that it will be read by a critical public capable of being persuaded by the truth and of rejecting the bogus article. Admittedly, the ideal of complete objectivity has seldom been achieved either by reporters or by historians. Both types of chroniclers give us their selection of the facts, and every such selection is really subjective. Dr. Samuel Johnson "took care that the Whig dogs should not have the best of it," and many other reporters have been frank partisans. Homer Bigart, Pulitzer-Prize-winning reporter of the *New York Herald Tribune*, writing from behind the Iron Curtain, concedes that, although the reporter is required to "give both sides," the bias "creeps in."

A century ago newspaper reporters took little pains to disguise their emotional reactions to an event. In its issue of February 18, 1815, *Niles' Weekly Register* reported the ending of the War of 1812 with the headline "GLORIOUS NEWS" and a subhead that was a stanza from *The Star-Spangled Banner*. The story began in this vein: "Who would not be an American? Long live the republic! Peace is signed in the arms of victory." No, clearly Hezekiah Niles was uninfected with the virus of neutrality. Great reporting is written in the midst of stirring action, not from the vantage point of an ivory tower. Once the reporter has determined what is true by sifting the evidence and discarding the false, there is no continuing obligation on his part to remain neutral. The great reporter is a partisan for the truth. The great reporter has a social conscience.

We rejoice that Victor Hugo's account of Napoleon the Little's December 4 Massacre constituted a passionate denunciation of "the murder of a people by one man," that young MacGahan could arouse the Western world with something of his own fiery indignation at the Turkish atrocities in Bulgaria, that Richard Harding Davis did not remain any more neutral in thought than did the Germans in action when they invaded Belgium in World War I and conducted themselves in Louvain "like men after an orgy."

Sometimes events are reported while controversy still flames at white heat. While editors would agree with Lewis Gannett that truth cannot always be discovered "by seeking the mathematical middle ground between heated contestants," they are cognizant of the fact that truth is seldom either black or white, although sensationalists would paint it either way. Accordingly, they have sought to present both sides of many controversial news events. New York newsmen took diametrically opposing views on a vital point in the celebrated duel between Burr and Hamilton. The national capital at the time the Bonus Army was smashed seemed to a French reporter, Jules Sauerwein, like ancient Carthage, but to Lee McCardell, an American newspaperman, the routing of the veterans assumed the elements of more intimate, personal tragedy.

No single reporter can give the whole picture of a battle, a flood, a calamitous fire. The testimony of many observers must be enlisted to re-create so grandiose and staggering a canvas. Waterloo is one of the best examples. Napoleon's personal behavior when disaster confronted him on that occasion is viewed through hostile British eyes and through sympathetic French eyes. Henry Villard's stunning beat at Bull Run, really a preliminary story, was supplemented by William Howard Russell's later and more complete account of the "miserable, causeless panic," which Villard had barely hinted at. Whitelaw Reid clearly recognized Pickett's disastrous charge at Gettysburg for what it was—"a crushing defeat." A Southern reporter tried to retrieve a measure of glory for the Confederacy's dead heroes of that engagement. Accounts of American and Japanese newsmen who reported phases of the recent war in the Pacific in dispatches were amusingly at variance.

Newspaper Editor Erwin D. Canham makes the point that rhetoric is perhaps the least of the requisites for reporting. The most essential obligation of the reporter is to get the story right. Nevertheless, to have staying power great reporting must possess literary quality. Terseness and vitality distinguish such reporting, whose color is obtained without resorting to exaggeration (sports writers excepted, of course!), stooping to the bromidic, or employing fossil phraseology, empty verbiage, too often betraying a poverty of factual information and a lack of reportorial zeal. The kind of reporter we have been on the lookout for is the newsman who, as A. J. Liebling puts it, "uses metaphors as sparingly as a Montclair housewife employs garlic," but, while eschewing words that throb, nonetheless knows "where to find the right part of speech when he has to have it." Even sports writers in recent years, in the opinion of Stanley Woodward, are beginning to see the light and to avoid "the unholy jargon," that tendency to call things by names other than their own.

Over the past hundred years the structure of the news story has undergone drastic modification. It is today a commonplace of American journalism that a news story must illustrate hind-to-end writing. Unlike other literary forms, the climax is at the beginning. The lead, or opening paragraph or paragraphs, gives the reader the essential facts. The body of the story is merely detailed expository material, its paragraph structure a series of separate units without transitions connecting them with what went before or what is to follow, and arranged in decreasing importance. The body of the news story must meet the cutoff test. If at any point after the lead a deletion should be made in the story, the essential facts will still remain.

What is now the sacred cow of journalism was unknown to newsmen before the close of the nineteenth century. Take, for example, the magnificent news dispatch on the charge of the Light Brigade sent in by William Howard Russell, a star war reporter, from the heights before Sebastopol. It began in leisurely style: "If the exhibition of the most brilliant valor, of the excess of courage, and of a daring which could have reflected luster on the best days of chivalry can afford full consolation for the disaster of today, we can have no reason to regret the melancholy loss which we sustained in a contest with a savage and barbarian enemy."

Then Russell proceeded to describe the various phases of the battle, and, not until the very last paragraph, do we get a full realization of the catastrophic nature of the losses suffered by the 607 sabers of the Light Cavalry Brigade. Yet the story meets the basic criteria of editors today. It provides all the facts from every available source, and answers the traditional five reporter's questions: *Who? What? When? Where? Why?* Most important, from beginning to climactic concluding tabulation, it holds the reader's attention unflagging.

Another experienced reporter, Henry Morton Stanley, started off his dispatch announcing his discovery of Livingstone by reflect-

ing upon how his prospects had improved in the course of the last two months of his African journey. Then came the electric sentence: "And the only answer to it all is Livingstone, the hero traveler, is alongside of me." But for the details of the perilous trip, we must read a long recital. The classic dialogue of the encounter between Stanley and Livingstone is reserved for the very last lines of the story. By postponing the answer to many questions about the course of his adventure Stanley maintained an atmosphere of tension down to the account of the climactic meeting at the very end of the dispatch.

These older techniques, still widely observed in British journalism, were geared to the gaslight era. But they were at times abused. The *New York Tribune* reporter of the Sullivan-Corbett fight in New Orleans in 1892 who wrote 2500 words or more before he said who won must have been a direct cause of the revolution in the technique of news writing. By the time of the Spanish-American War the modern news story, with its conventional lead and body structure, was widely used.

The lead has been aptly described by John C. Rogers, a *Herald Tribune* staff man, as a "sort of come-on. Like a woman's eyes or a barker's line, the lead must invite interest or the suitors and customers may turn away." The normal approach is the summary lead that gives the gist of the story. "Four men were killed and eighty-four persons went to hospitals with gunshot wounds, cracked heads, broken limbs, or other injuries received in a battle late this afternoon between police and steel strikers at the gates of the Republic Steel Corporation plant in South Chicago." This was the lead for *The New York Times* account of the Memorial Day Massacre in 1937. Gene Currivan started his *Times* story of the forced tour at Buchenwald in this fashion: "German civilians —1200 of them—were brought from the neighboring city of Weimar today to see for themselves the horror, brutality, and human indecency perpetrated against their 'neighbors' at the infamous Buchenwald concentration camp. They saw sights that brought tears to their eyes, and scores of them, including German nurses, just fainted away."

To avoid stuffiness and monotony reporters have found it expedient to introduce variations of the conventional lead, the most electrifying of these innovations being the cartridge lead effective in big stories. "The old San Francisco is dead" was the way Will Irwin began his account of the great earthquake. Jack Lait's story, leading off with these words: "John Dillinger, ace bad man of the world, got his last night—two slugs through the heart and one through his head," was calculated to hold the reader to the text as effectively as contact with a third rail. Or let us consider the lead for *Time* magazine's story on Pearl Harbor: "The U. S. Navy was caught with its pants down. Within one tragic hour—before the war had really begun—the U. S. appeared to have suffered greater losses than in the whole of World War I." Occasionally a direct quotation at the start can galvanize reader interest. "Herman Rosenthal has squealed again." What all the plunderworld was whispering served as the terse opening of Herbert Bayard Swope's sensational exposé of Police Lieutenant Becker's plot to murder a gambler.

Current fashions in news reporting indicate a perceptible trend away from the unimaginative application of the hind-to-end technique and the cutoff test, and the return to the literary styles of Messrs. Russell and Stanley. Not only is this true of news-magazine writers like John Hersey and Rebecca West, but the symptoms are manifest in the work of some of the best of contemporary newspaper reporters. "Here is the first and only eyewitness report on the opening chapter of the British expeditionary troops' advance in Norway south of Trondheim. It is a bitterly disillusioning and almost unbelievable story." With these words Leland Stowe launched into a superb account of British frustration in Norway and more than fulfilled the promise of his lead, but one has to read the entire story to get all the facts.

The same rules for writing a news story do not apply to the "feature" story, where the reporter takes a detail, perhaps from a major news story, and stresses "angles," often emotional or humorous, with the idea of both informing and entertaining. Nor do the conventional rules govern the interview story, where the reporter emphasizes what is said rather than what happens.

No inconsiderable portion of great reporting is fortuitous, the result of the opportunity to be a spectator at the ringside of great events, some known in advance, for which preparations can be made, some tremendously unexpected.

An entire article could well be devoted to coverage of gossip reporting. From the announcement in the London *Morning Post* in 1787 that the Prince of Wales' arrival at Brighton had "frightened away a number of old maids who used constantly to frequent that place!" down to the assiduity of American news magazinemen in ferreting out the details of the romance that culminated in the abdication of Edward VIII for "the woman I love," gossip reporting has enlisted some high-level talent. "You, sir, thrive by scandal and live by defamation," someone fairly charged an early English editor. Oliver Goldsmith was even more explicit. To him most reporters of his day were collectors of gossip. "They only collect their materials from the oracle of some coffeehouse, which oracle has himself gathered them the night before from a beau at a gaming table, who has pillaged his knowledge from a great man's porter, who had had his information from the great man's gentleman, who has invented the whole story for his own amusement the night preceding." Substitute Stork Club for coffeehouse and press agent for gentleman's gentleman, and you have identified quite a few current gossip outlets.

No more brilliant gossip reporter ever lived than Benjamin Disraeli, whose newspaper work in the 1830's aroused wide attention. Hedda Hopper and Louella Parsons had their counterparts in the Countess of Jersey and the Duchess of Sutherland, immortalized in Disraeli's last novel, *Endymion*. Once when the Duchess' rival entered a Mayfair drawing room one feline stooge of la Sutherland said in a very audible whisper: "You must be careful what you say before Lady Jersey. She reports for the papers."

For several years we have lived in the company of great reporting and have found no evidence indicating that the art is senescent. We can not endorse the view of so recent a commentator as Ward Greene, who feels that reporting stories of our own day fail usually to "stand up," that newspaper stories were "better then." True, for bravura reporting few of the present generation can equal a Victor Hugo, a Russell, a Forbes, or a Richard Harding Davis. Nor do the current run of news stories sound quite the lurid note of the effusions of the roaring twenties, *The Front Page* era of Ben Hecht and Charles MacArthur. The cheering news is that rhetorical pyrotechnics and raucous sentimentality are disappearing from the better grade of news stories. Today reporters write with greater subtlety and depth than did most of their predecessors. They are better grounded in scientific and technical matters. They have better linguistic equipment when working in foreign countries, and they have by no means lost the touch for finding the social pulsebeat in their stories.

Today's men and women of the working press are as responsive to the challenge of great events as were the star reporters of an earlier day. In the final analysis history is news reporting in slow motion. The reporter who seeks out the evidence at first hand is marching with the shock troops in the battalions of truth. He has "loosed the fateful lightning of a terrible, swift sword"—the truth that shall make men free. ♦

OPEN MINDS WITH ANTENNAE

by Kenneth I. Brown

NO MAN IS AN ISLAND, neither can he live within an all-inclusive government of one. He needs that sensitiveness to the incipient emotions and heart-longings of others if he is to live as a responsible member of the human race. He needs a special competence in those media of communication which are more difficult than the spoken language—the troubled eye, the quivering mouth, the withheld presence. Love is not alone the giving of self, even though that giving be generous and abundant. Love is the giving of self to another's need, and that need of the other can be learned not from generalizations about mankind nor from text books on psychology, but through the sensitive outreach of a human spirit touching gently another human spirit.

Ruthlessness has its price, and also its consequences, and the wise man knows both in advance. The man without any antennae is the man who never quite comes into contact with his fellow human beings. He never sizes up the whole situation. He makes love into a self-thing because being without antennae he never touches the soul and the spirit of another.

There is something essentially tragic about the man who is unaware of the music in the air which he is not hearing, of the pictures in the air which he is not seeing. There is something essentially tragic about the man whose armor of personality prevents the subtle delicate shafts of human understanding that come from another from penetrating into his own mind and heart.

One of the functions of education is to make us aware of the possibility of such understanding. Perhaps education is a process of building within us, according to the latest models, antennae which will allow us to move into direct contact with the spirit and the heart and the mind of another. I suppose that comes through the multiple and varied experiences of learning and living and loving. I am sure it comes in part through the human outreach that through understanding and compassion touches those around us.

Not only, however, do we need to be men and women with antennae. There is surging demand today that nations be nations with antennae, and with our concern for our beloved country, let us interpret this by saying, our United States needs especially to be a nation with antennae, catching the cries of the spirit, the suppressed longings of the other nations, large and small.

For example, you don't build faith in democracy by believing the man opposing you to be an ignoramus or a scoundrel. We Americans are so often guilty of a parochialism of a high order. We are so convinced that we have the best form of national government—and so we have—that we fail to realize sometimes some of the very great strengths of the British Government. And the British in turn are so convinced that they have the best form of government that they fail to realize the strengths of our organization.

In similar fashion we are persuaded that we have the best culturally, the best intellectually, the best philosophically, the best religiously in the whole world, and that kind of intellectual chauvinism can produce some exceedingly dangerous results. For example, it can produce a judgment that we in America have no need to know and to understand what other countries have—no need for antennae selfishly used—since obviously they have nothing to compare with our achievements, and why should we concern ourselves with lesser things.

Now it is one thing to know thoroughly ourselves as a nation and as a great people, and to appreciate our achievements in comparison with similar achievements in other countries. But it is a quite different thing, out of sheer ignorance and in chauvinistic arrogance to believe ourselves best, and it is that kind of sheer ignorance of which we as Americans have sometimes been guilty.

We know India as a country of poverty, and no one who has seen India will for a moment deny India's devastating poverty. But let it be said that one of the very great revolutions taking place in India today, with the Indian government and the Ford Foundation working handsomely together, is in this area of village life where standards have been unspeakably low. What the average American does not know is the prosperous side of India, the cultural, intellectual, educational side of India. What the average American does not know, and presumably does not have too much interest in knowing, are those areas in which India has much to offer us.

When I came back from a trip last November I was having luncheon with one of my college-graduate friends who has traveled widely, but not outside of our own country. He said to me: "How did you travel in India?" I told him that we traveled by plane between the large cities, and in the cities themselves by car.

My friend showed obvious surprise. "But do they have automobiles in India?" I laughed and said that the home where we were staying had three cars at its front door, and we were welcome to make use of any of them.

My friend's face showed his amazement: "But what do you drive on when you drive in a car?" I smiled and told him that we were in New Delhi, one of the most beautiful cities in the world, patterned after our own capital of Washington, with its government buildings, converging streets and great circles of traffic. His answer was, "But I never knew that India had cars or had roads like those."

A second consequence is that intellectual arrogance can also persuade us that all other countries are sitting in passionate envy for everything we have, wanting nothing so much as to be exactly like us in government, in material prosperity, and in all the other facets of life. When you ask the man what he thinks the world envies us for most, he will probably answer, "Our automobiles, there are none better." (The Europeans, especially the Germans would dispute that.) Or, "Our roads, there are none better." (When I was in Berlin I saw some of the great autobahns and they certainly looked mighty attractive to the non-engineering eye.)

Have you ever stopped to notice that all the things we expect others to envy us for, are *material* advantages? And yet when the world shouts "Materialist" at us—as they do frequently and loudly —we are angry; we protest we are not materialists. We demand that the world see that there is a deeply religious and spiritual side to our culture and our civilization, and yet it is back to those materialistic advantages of our culture that we go when we list the things of which the world stands most in envy.

I am a child of my own culture and I admit my dependence on the automobile. I like our plumbing; I am happy to have enough to eat, with jam on the bread and a bit of whipped cream on the jam; I like it. In honesty I've got to admit that I am to that extent a materialist, putting body comforts, and physical ease and technical advantages very, very high in the scale of living. I sometimes am afraid that when I put these materialistic advantages so high that inevitably there is a corruption in my spirit and a deterioration in my soul that says, "These are the things that are important in life, not courage, and integrity, and compassion, and faith, and love."

There are lonely men and women in American life today—of all ages, and of skins of all hues. And whether they be young or old, and whether they be Negro or white, they are reaching out in their loneliness to those with antennae who can catch their distress signals of loneliness and will come to their relief.

There is need abroad today—stark, desperate, yawning, colossal need—some of it the physical need for bread, and some of it the mental need for intellectual understanding, and some of it the spiritual need for human friendship and divine forgiveness, a need for man and for God. And it will be men and women with this capacity for humane outreach and deep compassion who will first be aware of the existence of such need, and recognizing it will take their part in satisfying such need.

Be men and women with antennae. ♦

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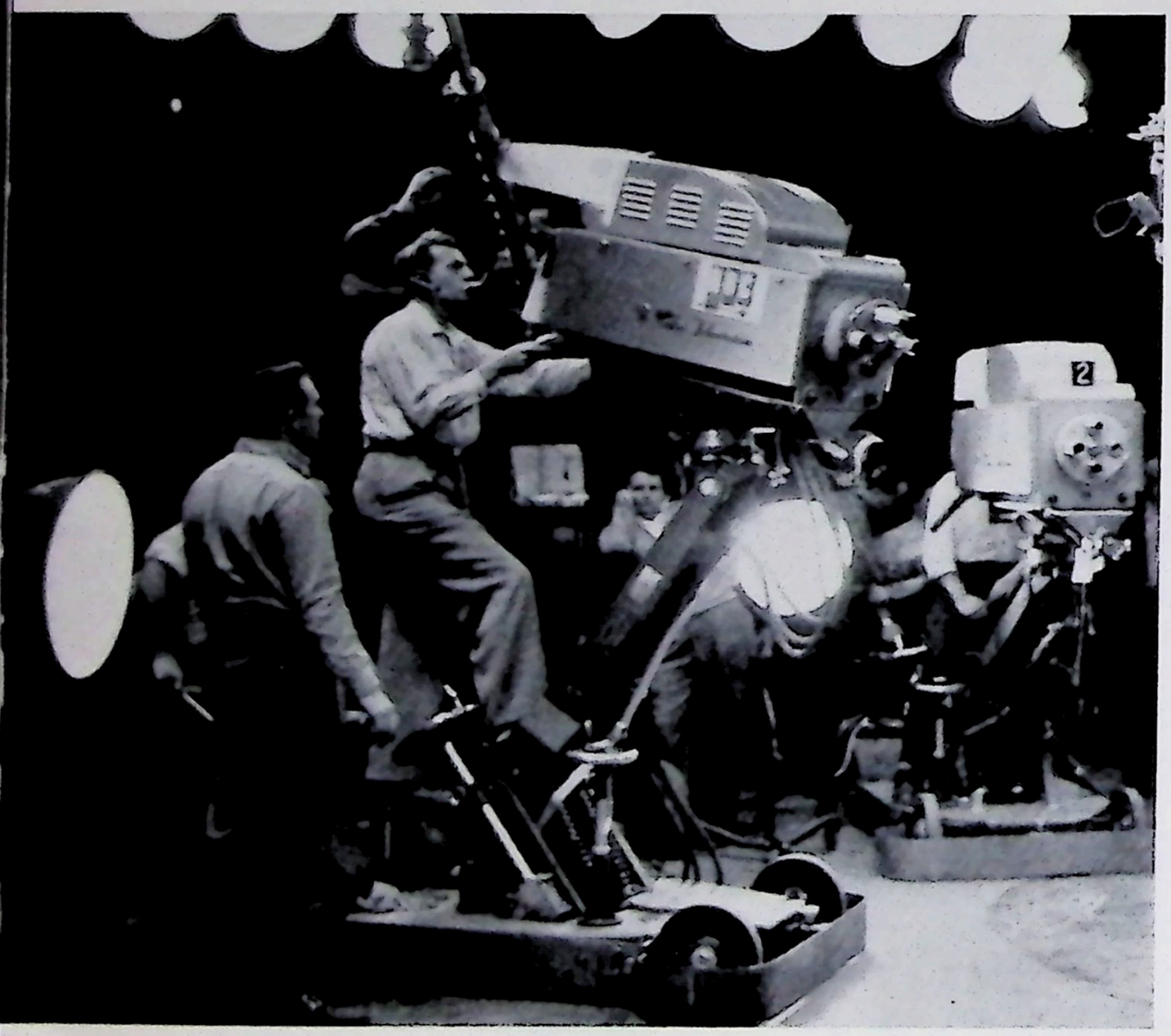

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Bertrand Russell	Eleanor Roosevelt
Herbert Hoover	Pablo Picasso
Jawaharlal Nehru	James B. Conant
Paul Tillich	Van Wyck Brooks
Sean O'Casey	Pierre Monteux
Alfred P. Sloan, Jr.	Margaret Mead
David Ben-Gurion	Frank Lloyd Wright
Pablo Casals	and other great philosophers,
Robert Frost	poets, scientists, artists,
Igor Stravinsky	statesmen and industrialists

Brig. General David Sarnoff, Chairman of the Board of Radio Corporation of America and the National Broadcasting Company, is shown seated at his desk reviewing issues of WISDOM MAGAZINE *and discussing the world's great men and women with Leon Gutterman, Editor and Publisher of* WISDOM.

WHAT IS A LIBERAL EDUCATION?

by Richard Livingstone

WHAT IS A LIBERAL EDUCATION? Most people would reply: "Subjects like history, literature, languages, pure mathematics, and science are a liberal education, but subjects like bookkeeping, business administration, commercial French, accountancy, cooking, and shorthand are not; they are technical or vocational, not liberal." So far as it goes, that answer would be true. But why are some subjects classed as liberal education and others not? In itself liberal education is an odd phrase. What has the adjective "liberal" to do with education, and why should a "liberal" education be regarded as a good thing? To answer that question, we must go back to the country where the phrase "liberal education" was first used. The word "liberal," "belonging to a free man," comes from a world where slavery existed, and has survived into times when, in the literal sense, it has no meaning because there are no slaves. To understand it, we must imagine ourselves in the Greek world where the great distinction was between free men and slaves, and a liberal education was the education fitted to a free citizen.

That distinction may seem obsolete in a world where slavery has been abolished. But though slavery has gone, the ideal of a free man's education is not antiquated. Here, as so often, the Greeks saw to the heart of the matter and put their fingers on an essential distinction. If we had understood and remembered this idea of a free man's education, our views of education would have been less confused and we should have gone straighter to our goal. Of slaves the Greeks took little account. Their condition prevented them from being men in the full sense of the word. But they held that the free man, the real man, the complete man, must be something more than a mere breadwinner, and must have something besides the knowledge necessary to earn his living. He must have also the education which will give him the chance of developing the gifts and faculties of human nature and becoming a full human being. They saw clearly that men were breadwinners but also that they were, or ought to be, something more: that a man might be a doctor or a lawyer or a shopkeeper or an artisan or a clerk but that he was also a man, and that education should recognize this and help each individual to become, so far as his capacities allowed, what a man ought to be. That was the meaning of a liberal education, and that is its aim—the making of men; and clearly it is different from a technical education which simply enables us to earn our bread, but does not make us complete human beings.

And what is a complete human being? Again I shall take the Greek answer to this question. Human beings have bodies, minds, and characters. Each of these is capable of what the Greeks called "virtue" . . . or what we might call "excellence." The virtue or excellence of the body is health and fitness and strength, the firm and sensitive hand, the clear eye; the excellence of the mind is to know and to understand and to think, to have some idea of what the world is and of what man has done and has been and can be; the excellence of the character lies in the great virtues. This trinity of body, mind, and character is man; man's aim, besides earning his living, is to make the most of all three, to have as good a mind, body, and character as possible; and a liberal education, a free man's education, is to help him to this; not because a sound body, mind, and character help to success, or even because they help to happiness, but because they are good things in themselves, and because what is good is worth while, simply because it is good. So we get that clear and important distinction between technical education which aims at earning a living or making money or at some narrowly practical skill, and the free man's education which aims at producing as perfect and complete a human being as may be.

This is not to despise a technical education which is essential; everyone has to learn to make a living and to do his job, and he cannot do it without training; technical or vocational education is as much wanted as liberal education. But they are not to be confused. They are both important, both necessary, but they are different. And yet to some extent they overlap. Take French. A man may study it in order to be able to order his meals in a French restaurant, or for business purposes; then it is technical education. He, as a man, is no better for being able to talk to a French waiter or to order goods in the French language. But he may study French to extend his knowledge of the thoughts and history and civilization of a great people; then it is liberal education. He, as a man, is more complete for that knowledge. Or take carpentering: its study may be a means to a living or to making furniture or boats or other objects; then it is technical education. But it may also give a clearer eye, a finer sense of touch, a more deft hand, and in so far make a better human being; then carpentering is liberal education. Or take Greek; it may be studied in order to get across to the wisdom and beauty of Greek literature; then it is liberal education. Or its student may have no interest in these things, but simply be taking it in order to get an extra credit in the School Certificate; then it is technical education—if it is anything. In fact as Aristotle remarked, "in education it makes all the difference why a man does or learns anything; if he studies it for the sake of his own development or with a view to excellence it is liberal."

This is the kind of education (without prejudice to others) which we want—that people should study "for the sake of their own development or with a view to excellence," so that they may become human beings in the Greek meaning of the words, and not remain mere business men, mere chemists or physicists, mere clerks, mere artisans or laborers. If so, we have a clue to the maze of education, a guide to choosing dishes from the educational menu. Whatever else we select to meet our personal tastes or needs, the dinner must include the vitamins necessary to human health, so that we achieve that liberal education which makes men fully developed, within the range of their individual capacities, in body, character, and mind. ♦

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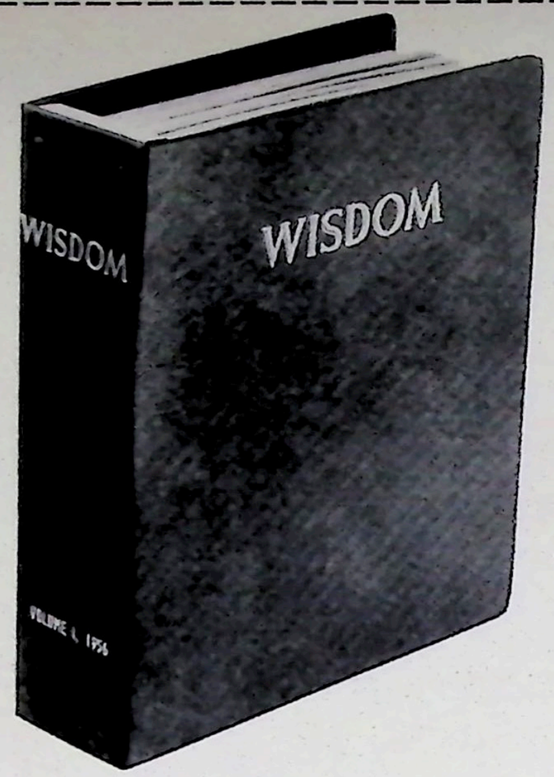

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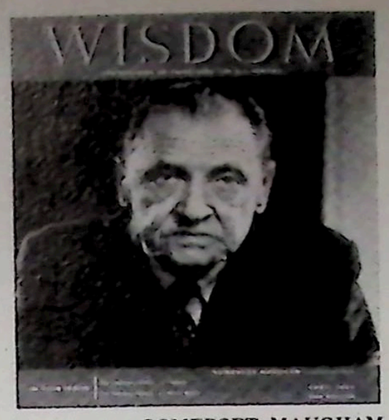

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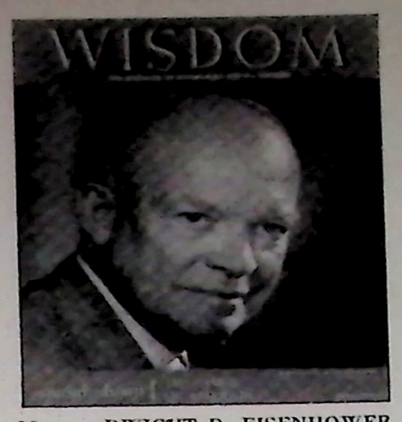

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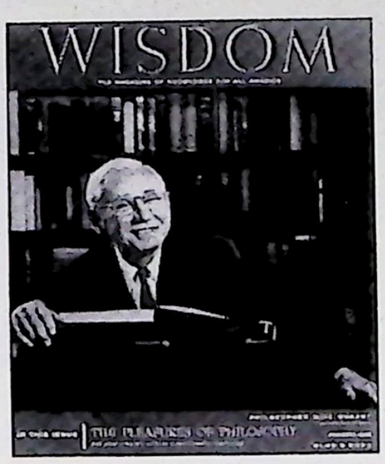

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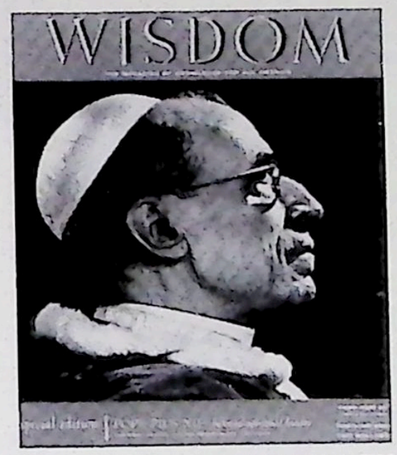

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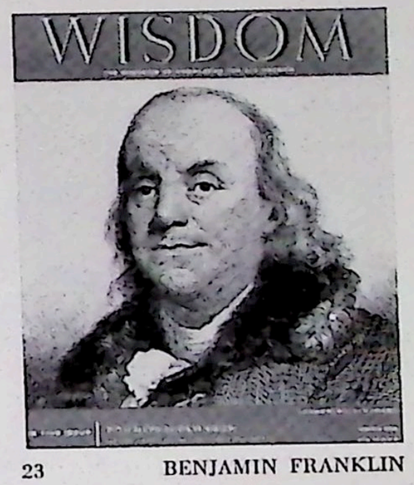

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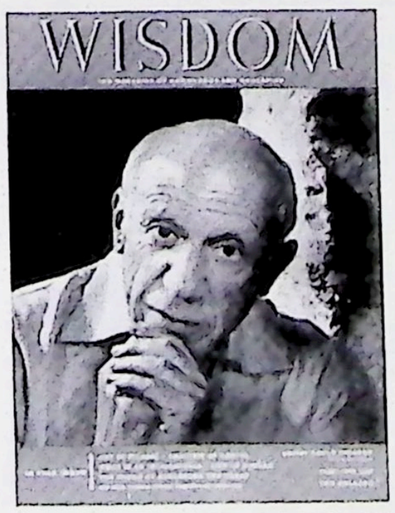

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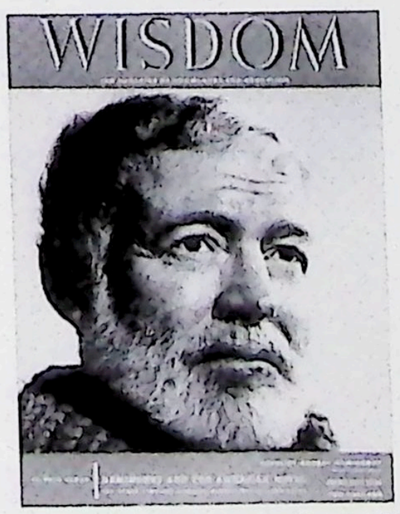

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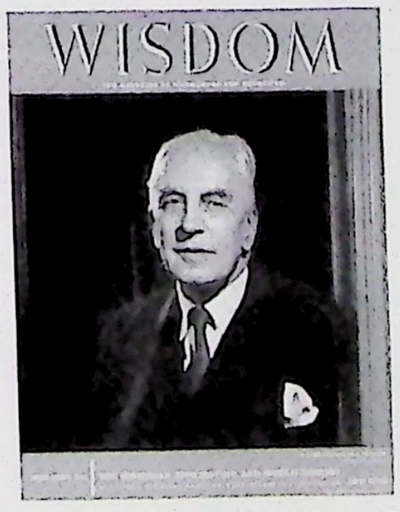

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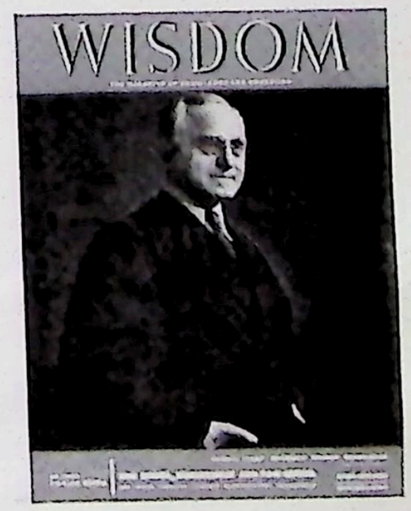

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